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No. 09-

Supreme Court, U.S.
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In The Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

LORETTA K. KELLY,
WARDEN, SUSSEX I STATE PRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS E. KELLY, JR.
Counsel of Record
STANFORD E. PURSER
JOANNE M. HEPBURN
K&L GATES, LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 370-6683
thomas.kelly@klgates.com

ROBERT LEE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
(434) 817-2970
roblee@vcrrc.org

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson St.
Tallahassee, FL 32301
(850) 224-0004
meolive@aol.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

(Execution scheduled for November 17, 2009)

Without explanation, Petitioner, a person sentenced to death in Virginia, received no Fourth Circuit appellate review of the district court's denial of his habeas corpus petition. In response to Petitioner's applications to appeal, the Circuit Court wrote only that "the Court denies a certificate of appealability" ("COA"), and the district court wrote only that because it had denied Petitioner's claims, *ipso facto*, "Petitioner does not present 'a substantial showing of the denial of a constitutional right,'" and was not entitled to appeal.

This Court has instructed lower courts to avoid both the extreme of "issu[ing] . . . a COA . . . pro forma or as a matter of course," and the other extreme of "declin[ing] the application for a COA merely because [the court] believes the applicant will not demonstrate an entitlement to relief," (*i.e.*, the district court order below). *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003) ("*Miller-El I*"); *see also Slack v. McDaniel*, 529 U.S. 473 (2000). These facts present the questions:

QUESTIONS PRESENTED – Continued

1. When the lower federal court gives no indication that it applied the correct (or every indication that it applied the wrong) standard for evaluating a COA, can this Court be confident that the lower court has stayed within the appropriate "middle zone" for allowing or disallowing an appeal?

2. Were the summary COA denials by the Fourth Circuit and the district court: (a) sufficient for this Court to determine the correctness of the decisions and to assess adherence to the standard for the issuance of a COA; and/or (b) in conflict with the standard set out in *Miller-El I* and *Slack*, and used by other Circuits in determining requests for COA?

3. Do Petitioner's claims, including the following, satisfy the correct COA standard:

   a. Did the District Court erroneously conduct *de novo* merits review and grant Respondent's motion to dismiss the 28 U.S.C. § 2254 petition without applying or addressing the mandatory requirements of Federal Rule of Civil Procedure 12(b)(6) or *Townsend v. Sain*, 372 U.S. 293 (1963)?

   b. Petitioner would not have been convicted and sentenced to death without the testimony of Rebecca Gragg, but she denied any knowledge about the offense

QUESTIONS PRESENTED – Continued

for months and only implicated Petitioner after she was told she had failed a polygraph test and would be charged with murder unless she cooperated. Did the state court's refusal to allow cross-examination of her on these facts and to thereby provide jurors with the truth violate the Confrontation Clause?

c. Did the verdict form at sentencing that would have permitted the jury to sentence the Petitioner to life imprisonment rather than to death impose an improper burden on Petitioner, relieve the prosecution of its burden of proof, and prevent jurors from giving effect to mitigating evidence, in violation of Petitioner's Sixth, Eighth and Fourteenth Amendment rights?

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PETITION FOR A WRIT OF CERTIORARI

Larry Bill Elliott ("Elliott") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

ORDERS AND OPINIONS BELOW

In a one-sentence unreported Order, the United States Court of Appeals for the Fourth Circuit denied Elliott's request for a COA from the denial of habeas relief in this Virginia case. *See* Appendix ("App.") A-1. A timely petition for rehearing and rehearing en banc was denied on July 7, 2009. App. A-78.

The March 31, 2009, order and memorandum opinion of the United States District Court for the Eastern District of Virginia denying habeas corpus relief are not reported and are reprinted at App. A-2 and A-73. The district court's decision denying Elliott's motion to alter or amend judgment is at App. A-76. The district court's denial of Elliott's request for a COA is reprinted at App. A-75.

The decision of the Supreme Court of Virginia granting Respondent's motion to dismiss Elliott's petition for writ habeas corpus is reported at *Elliott v. Warden*, 652 S.E.2d 465 (Va. 2007), and that court's direct appeal opinion is reported at *Elliott v. Commonwealth,* 593 S.E.2d 270 (Va. 2004).

JURISDICTION

The district court granted Respondent's motion to dismiss and the Court of Appeals summarily denied a COA pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2253(c) to review the Court of Appeals' judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), including 28 U.S.C. §§ 2253 and 2254, and related Federal Rule of Appellate Procedure 22, reprinted respectively at App. B-3, B-4 and B-8.

This case also involves the Confrontation and the Assistance of Counsel Clauses of the Sixth Amendment to the Constitution, which state, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence," as well as the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, which state, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. Amend. VIII.

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

A. Introduction

A COA must be granted if it is "debatable" whether the issue in question "should have been resolved in a different manner" or "deserve[s] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 323, 338 (2003); *see also Tennard v. Dretke*, 542 U.S. 274, 282 (2004). Petitioner's claims are debatable and deserve encouragement.

The Court of Appeals denied a COA in a single sentence without application, discussion, reference, or acknowledgement of any of this Court's cases providing the proper standard of review. App. A-1. This Court is unable to determine the correctness of the lower court's ruling and cannot assess its adherence

to this Court's precedent.[1] The claims Elliott sought to appeal were both reasonably debatable and deserving of further review.

For example, the district court's reliance on a *per se* prohibition on any reference to the polygraph examination or examiner during a trial reflects a misunderstanding of the Confrontation Clause. The prosecution's star witness, exotic dancer Rebecca Gragg, told jurors that *the only reason* she dramatically changed her story to implicate Elliott after four months of denying any knowledge of the crimes was because police told her that Elliott had been taken into custody and she no longer feared he would harm her if she told the truth. Habeas Record (hereinafter "HR") 1586-87. In fact, she had changed her story only after police told her she had failed a polygraph test and threatened her with a murder charge. Use of this motivation to impeach her was at least debatably required, and a COA should have been granted.

A second example is that the sentencing verdict form imposed an unconstitutional burden on Elliott, relieved the prosecution of its burden, and prevented jurors from giving effect to mitigating evidence by requiring jurors to be unanimous in finding that prosecutors *failed* to prove an aggravating circumstance, even though Virginia law required that jurors

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[1] The district court denied a COA because it had denied the habeas petition, a clearly incorrect legal basis.

be unanimous in finding that the prosecutor *succeeded* in proving an aggravating circumstance in order for a person convicted of a capital crime to be eligible for a death sentence. Such a scheme is at least debatably in violation of the Eighth and Fourteenth Amendments. *See Smith v. Spisak*, 129 S. Ct. 1319 (Feb. 23, 2009) (Order granting writ of certiorari).

Finally, the district court improperly granted the Warden's motion to dismiss by relying on *the Warden's* factual allegations and affidavits, without applying Federal Rule of Civil Procedure ("FRCP") 12(b)(6), and in violation of the requirements of *Townsend v. Sain*, 372 U.S. 293, 313 (1963).[2] Such a procedure is *at least* debatably wrong among reasonable jurists. *Miller-El I*, *supra*.

B. Procedural History

Elliott was convicted in Prince William County Circuit Court of the capital murder of Dana Thrall, the first degree murder of Robert Finch, and two firearm offenses.[3] Elliott's convictions and death sentence were affirmed on March 5, 2004. *Elliott v.*

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[2] In a brief order denying Elliott's motion to alter or amend judgment, the district court claimed that its memorandum opinion dealt with *Townsend*, but the case was not mentioned in the memorandum. App. A-76.

[3] Elliott was tried initially in July 2002, but the court declared a mistrial after a juror improperly discussed the case with a third party during trial. *Elliott*, 593 S.E.2d at 278.

Commonwealth, 267 Va. 396, 593 S.E.2d 270 (Va. 2004). His Petition for a Writ of Certiorari was denied on January 10, 2005. *Elliott v. Virginia*, 543 U.S. 1081 (2005).

On March 11, 2005, Elliott timely filed a petition for writ of habeas corpus with the Supreme Court of Virginia, along with 49 supporting affidavits. He also filed motions seeking an evidentiary hearing, discovery and related assistance. The Warden filed a motion to dismiss but also submitted six affidavits in opposition to some of the facts in Elliott's affidavits. On November 2, 2007, the Virginia Supreme Court granted the Warden's motion to dismiss and denied all of Elliott's motions. *Elliott v. Warden*, 652 S.E.2d 465 (Va. 2007). On March 6, 2008, the Virginia Supreme Court denied Elliott's Petition for Rehearing.

On May 6, 2008, the United States District Court for the Eastern District of Virginia stayed Elliott's execution to allow him to file a petition for writ of habeas corpus. On July 3, 2008, Elliott filed such a petition, along with motions for discovery and an evidentiary hearing, and to develop facts in support of his claims. On August 8, 2008, the Warden filed a "[Habeas] Rule 5 Answer and Motion to Dismiss."[4] In a March 31, 2009, decision, the district court

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[4] The Answer and Motion to Dismiss were identical documents, each claiming to supply its reasoning in a single accompanying "memorandum of law."

addressed the merits of each of Elliott's claims,[5] granted the Warden's motion, and found that all of Elliott's motions were moot. The district court summarily denied a COA because it had denied relief.

On May 15, 2009, Elliott filed a notice of appeal in the district court, and a request for COA in the Court of Appeals. On June 10, 2009, the Court of Appeals issued the following Order:

> Upon review of submissions relative to the appellant's motion for certificate of appealability, the Court denies a certificate of appealability and dismisses the appeal.

App. A-1. A petition for rehearing and rehearing en banc was denied on July 7, 2009. The Court's mandate issued on August 7, 2009.

On August 10, 2009, the state circuit court scheduled Elliott's execution for October 5, 2009. Elliott submitted a clemency petition to the Virginia Governor on August 28, 2009. On September 16, 2009, the Governor issued a reprieve, delaying the execution

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[5] Elliott's petition argued that the AEDPA did not apply to any of his claims. *See, e.g.*, *Elliott v. Kelly*, No. 1:08-cv-430, Dkt. # 22, Petition for Writ of Habeas Corpus, *passim* (filed Jul. 3, 2008) (each claim has a section entitled "The AEDPA Does Not Bar Relief"). The district court reviewed these arguments, articulated the prerequisites of the AEDPA, App. A-18-20, but then ignored them and conducted what the court entitled "Merits Review" of Elliott's claims, eschewing the restrictions of the AEDPA. *See* App. A-21-72. The Warden did not appeal the district court's application of this standard.

until November 17, 2009, to allow time to review the clemency petition.

C. Factual Background

After living his entire life without being arrested or charged with any crime, Bill Elliott (then aged 51) was charged with the January 2, 2001, murders of Dana Thrall and Robert Finch in their Woodbridge, Virginia townhouse where they lived with Thrall's two boys, aged 6 and 4. The boys were in their upstairs bedroom in the early morning hours when the victims were killed.

The next-door neighbor heard gunshots and called 911 at 4:23 a.m. The police arrived at the townhouse at 4:26 a.m., but the murderer(s) had fled. HR 5609-10. According to the state's testimony at trial, no one was seen entering or leaving the townhouse.

1. No Cross-Examination Allowed

The prosecution's star witness was Rebecca Gragg, an exotic dancer who promoted her services through Internet websites. Finch was the father of two of Gragg's children and the couple was embroiled in an extended custody dispute. Although Gragg claimed she was driving through the Carolinas at the time of the murders, the police immediately considered her a suspect. Elliott came to the attention of the police because he was having an affair with Gragg.

Gragg was interviewed frequently by police in the months following the crimes. She maintained that she knew nothing about the crimes or who might want to harm Finch or Thrall. When police asked about Elliott, including accusations that Elliott committed the murders on Gragg's behalf or at her request, she claimed to have no evidence implicating him. On May 10, 2001, however, the police conducted a polygraph examination of Gragg. The polygraphist concluded that Gragg was "deceptive" when answering three key questions (including, "Did you plan with anyone to have [Finch] killed"). HR 5586-87. The detectives told Gragg that she failed the polygraph and, unless she cooperated, *they were going to charge her with capital murder*. HR 2227-28, 2232, 2234, and 2243. Gragg then dramatically changed her story, saying that she now remembered that, in a 5:23 a.m. cell phone conversation after the offense, Elliott had said that he was "in Maryland" and had "a mess to clean up." HR 2635.

By the time of the second trial, Gragg was testifying that Elliott had told her in the 5:23 a.m. call that he was behind a restaurant where they once had dined (later determined to be Kaufmann's Restaurant in Gambrills, Maryland), and that he was in the process of "trying to dump" some "bloodied black trash bags" from the crime scene. HR 1586.

The only explanation Gragg gave jurors at trial about why she had not told police about the contents of her 5:23 a.m. conversation with Elliott in the four months following the crimes was because she was

afraid of him and that she only did so when she was told that he had been arrested. HR 1586-87. Cross-examination of Gragg about the impact of police accusations that she failed the polygraph was crucial to Elliott's defense, both because it showed Gragg's bias and motivation to lie and because it refuted her self-serving explanation for failing to disclose the alleged contents of the phone conversation earlier. This cross-examination was not allowed.

2. A Man, Not Petitioner, Seen Leaving the Murder Scene

There was no physical evidence in the townhouse linking Elliott to the crimes. HR 1354-55, 2588-96, 3744-45, and 3761-62. Police did, however, recover DNA samples from Finch's jeans and the inside of the back door that contained unidentified DNA from unknown contributors. The unidentified DNA was *not* from Elliott or either victim. HR 1857-58, 2588-94, and 2595-96.

At trial, there was no evidence that anyone was seen entering or leaving the townhouse. However, Cameron Thrall, uncle and adoptive parent of Thrall's two boys, later told Elliott's habeas investigator that the older boy said that he saw "a black man running out of" the townhouse "right after the murders." HR 5504. Elliott is Caucasian. Mr. Thrall said that he did not consider the information to be "new," *i.e.*, he thought police and/or others knew this, but he declined to provide the investigator with a signed affidavit. A police officer who was with the children

immediately after the crimes also told Elliott's habeas investigator that he and another officer interviewed the children and they had provided information, but he would not discuss the conversation without permission from his superiors. HR 5503-04. None of this evidence was provided to Elliott at trial despite assurances from the prosecution that it would provide the defense with all exculpatory information. HR 22-25, 42-43.

3. Police Suppress Location of Cell Phone Call

When the police interviewed Elliott, he volunteered that several times in the weeks prior to the murders and in the early hours of January 2, 2001, Gragg asked him to take photographs of Finch smoking marijuana outside the townhouse and he attempted to do so. Gragg hoped to use these photographs in her custody dispute. Elliott did not see Finch outside the townhouse on January 2, so he left Woodbridge to go to his office in Fort Meade, Maryland at around 4:00 a.m. – well before the neighbor called 911, at 4:23 a.m., to report that she heard shots. HR 5609-10.

Elliott arrived at Fort Meade shortly after 5:00 a.m. and spoke briefly with co-worker, Todd Prach. Paragraph 9, July 2, 2008, Affidavit of Larry Bill Elliott ("Elliott Affidavit"), attached to Federal habeas petition. Elliott told defense counsel about Prach but they never attempted to contact him. *Id.* at § 8. Prach provided an affidavit in habeas proceedings

stating that he recalled speaking with Elliott at Fort Meade between 5:00 and 5:30 a.m. HR 5496.

After talking with Prach, Elliott went out to the parking lot and placed a five-minute cell phone call to Gragg beginning at 5:23 a.m. Elliott Affidavit at § 9. In his state habeas petition, Elliott alleged that cell phone tower records would show that Gragg's trial testimony that Elliott was behind Kaufmann's Restaurant disposing of bloody bags when he placed the 5:23 a.m. call was false. The habeas investigation revealed that the police and the prosecution suppressed the location of the cell tower that was utilized in Elliott's 5:23 a.m. call. Elliott established that the police received records from the cell carrier regarding the location of that cell tower, but redacted it from the records provided to the defense. HR 5627-29. This information would show that Elliott made the call from the parking lot of his office, and not from behind the restaurant in Gambrills, thereby demonstrating that Gragg's story was false. Elliott's trial counsel never tried to obtain this information. Elliott Affidavit at § 9.

4. Other Evidence

Because there was no evidence at trial that anyone was seen entering or leaving the townhouse, the prosecution's case was based on Gragg's belated "recollections," and on limited, ambiguous and unreliable circumstantial evidence. The primary piece of circumstantial evidence was a single drop of Elliott's

blood that police claimed to have found on the outside back gate of the fence surrounding the townhouse's small back yard deck.[6]

The limited probative value of the blood drop was recognized by the trial judge who found that jurors could conclude that Elliott never went into the townhouse and that one or two other unknown individuals

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[6] Numerous significant questions about the drop of blood need answers. The prosecution's DNA expert testified that there was no way to know whether the drop was placed on the gate as long as a week before the crimes, or days afterwards. HR 3987. Although a police officer testified that the drop was recovered the day of the murders, that officer's supervisor told Elliott's habeas investigator that it was recovered a day or two later. HR 5502. Indeed, although the police took 400 to 500 photographs of the crime scene on the day of the crimes, there was no photograph of the back gate or the blood drop. HR 1337-38. The 20 minute police videotape of the crime scene did not record images of the gate or the drop of blood. Furthermore, the officer who "found" the blood drop contradicted himself under oath on numerous material issues: (1) when he took the photograph of the gate shown to jurors (he admitted on cross-examination that it was taken in May 2001, not January 2001), HR 1309; (2) where the blood drop was found on the gate (he admitted on cross-examination that he previously said it was at another location), HR 3749-50; and (3) whether he took photographs of the blood drop and, if so, whether they were developed and whether negatives existed, HR 1337-38, 3747-48 and 6054.

whose DNA was found at the scene actually committed the murders.[7] HR 1857-58.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari or a Certificate of Appealability Because the Lower Courts Did Not Properly Apply this Court's Law, and/or it is Impossible to Tell What Law Was Applied

In order to receive a COA for any proposed appealable issue, an appellant need only "demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El I*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). A "substantial showing" is made if "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 336 (internal quotations omitted); *see also Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Importantly, "a COA does not require a showing that the appeal will succeed." *Miller-El I*, 537 U.S. at 337. Describing the

[7] This was pertinent because Virginia law requires that only the "actual" or "immediate" perpetrator of the crime – that is, a person who "take[s] a direct part in inflicting fatal injuries" – is eligible to be convicted of capital murder. *Muhammad v. Commonwealth*, 619 S.E.2d 16, 34 (Va. 2005) (quoting *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991)).

relatively low threshold for issuing a COA, this Court explained:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot* [*v. Estelle,* 463 U.S. 880, 893 (1983)]. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El I, 537 U.S. at 338. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342.[8]

In Elliott's case, the Court of Appeals summarily denied a COA without ever referencing, discussing or applying this Court's standard. An Order from a lower court denying a COA should provide enough information for this Court to be confident that the lower court has not fundamentally misconstrued its obligations when reviewing a COA application. One fundamental element of this review, noted by this Court in *Miller-El I*, 537 U.S. at 336-38, is that an appellate court must avoid both the extreme of

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[8] Accordingly, the district court's denial of a COA because it had denied the habeas petition was an abuse of discretion because it was contrary to law.

"issu[ing] . . . a COA . . . pro forma or [as] a matter of course" and the other extreme of "declin[ing] the application for a COA merely because [the court] believes the applicant will not demonstrate an entitlement to relief."

In a case such as Elliott's, where the Court of Appeals issued only a one-sentence, summary denial, *it is impossible for the Court to ensure that the appellate court stayed within the appropriate "middle zone" of Miller-El I. See Netherland v. Tuggle,* 515 U.S. 951, 952 (1995) (finding it impossible to determine whether Fourth Circuit had applied proper standard where "actions of the court were taken by summary order without opinion or discussion"). Indeed, the only option the Court of Appeals left for this Court is for the Court to make its own determination of the debatable quality of the appellate issues or to decide which, if any, of Elliott's claims deserve further review.

Without any explication of the lower court's reasoning in granting or denying a COA, this Court will be hard-pressed to find adequate evidence to assure that there is uniformity across the circuits in the standard of review applied to determine whether or not to allow appellate review. An independent evaluation of Elliott's claims reveals that they are, at a minimum, debatable among reasonable jurists, and deserving of appellate review.

II. The District Court Did Not Properly Apply Federal Rule of Civil Procedure 12(b)(6) and *Townsend v. Sain*

Elliott sought permission to appeal the district court's failure to apply the correct standard when granting the Warden's motion to dismiss. At Elliott's urging, the district court did not apply the AEDPA but instead addressed the merits of the claims. The court's merits review "agree[d]" with the state court decision and, like the state court, granted the Warden's motion to dismiss the petition as a matter of law, without an evidentiary hearing or any other opportunity for factual development or resolution of factual disputes. In light of this ruling, the district court deemed all other pending motions moot. App. A-73.

When ruling on a motion to dismiss, a court must proceed "on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *id.* at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"). Despite this standard, the district court (like the state habeas court) did *not* assume Elliott's allegations of fact to be true. Instead, the district court presumed true "essential facts" taken from the narrative of the state supreme court on direct appeal, even though that court expressly qualified its narrative as "recount[ing] the evidence as reflected in the record in the light most favorable to the Commonwealth, the prevailing party below." *Elliott*, 593

S.E.2d at 273. Similarly, the district court (again, like the state habeas court) presumed true factual allegations *made by the Respondent Warden in support of her Motion to Dismiss* in state habeas corpus proceedings, even though:

> i.) the Warden expressly argued that the taking of evidence was not necessary in order for the state court to grant her motion, and the state court denied all of Elliott's requests for an evidentiary hearing or other opportunity for factual development, presentation, or resolution of factual disputes, *Elliott*, 652 S.E.2d at 489; and
>
> ii.) the state court granted the Warden's motion to dismiss without an evidentiary hearing or other opportunity for factual development or resolution, and in repeated reliance on evidence either in dispute or proffered by the Warden, *id.* at 471-72.

Elliott filed 49 affidavits in support of his state habeas petition[9] and a number of motions seeking an evidentiary hearing, discovery and related assistance. Among the affidavits were reports from habeas investigators and other witnesses of conversations with police and others who claimed to truthfully report events but who refused to provide affidavits

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[9] Elliott also filed these 49, along with additional affidavits, with his Federal habeas petition.

voluntarily to Elliott's representatives.[10] Elliott made clear in the state habeas petition that all materials in the Appendix were offered as evidence and as "proffer[s] or forecast[s] of evidence that Elliott would present, along with appropriate foundation, at the requested Evidentiary Hearing." *Elliott v. Warden*, Petition at 1, n. 3. As required by Va. S. Ct. R. 5:7A(b), Elliott asserted that the taking of evidence was necessary for the proper disposition of the petition. He also sought but was refused oral argument "to address the existence of numerous factual disputes . . . and to resolve such disputes during an evidentiary hearing." *Id.*, Petitioner's Motion for Oral Argument (Va. filed May 25, 2005).[11]

In response to the petition, the Warden filed a "Motion to Dismiss Petition for Writ of Habeas Corpus," stating that, "[i]n the opinion of the Attorney General, the taking of evidence is not necessary for the proper disposition of the petition." *Id.* at 1 (filed May 5, 2005); *see also* Warden's Reply at 2 (filed May

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[10] The state court rejected evidence Elliott proffered in support of numerous claims on hearsay grounds, *see, e.g.*, *Elliott*, 652 S.E.2d at 471, 475, 476 (2), 479-80 (multiple), 481, but credited hearsay evidence proffered by the Warden, *id.* at 471-72.

[11] Elliott also sought discovery. *See, e.g.*, Motion for Leave to Conduct Deposition of Witnesses; Motion for an Order Releasing Physical Evidence for Examination and Testing and Authorization to Retain [Experts]; Motion for Leave to Propound Interrogatories; and Petitioner's Motion for Leave to Obtain/Issue Subpoenas Duces Tecum for Production of Documents and Things (all filed Jun. 17, 2005).

24, 2005); Warden's Opposition in Response to [Discovery] Motions at 3-4 (filed Jun. 23, 2005).

Despite taking this position, the Warden proffered six affidavits to the state court and argued that the state court should rely on these affidavits as evidence conflicting with, or rebutting, Elliott's affidavits and allegations. In conjunction with this argument, the Warden categorically opposed all requested depositions of any witness who was unwilling to speak voluntarily to Elliott's habeas counsel. Warden's Response in Opposition to Motions at 6 (Va. filed Jun. 23, 2005). The Warden produced no affidavits disputing the accounts Elliott proffered from witnesses who had probative evidence but who refused to provide sworn statements to Elliott, *i.e.*, that a man who was not Petitioner was seen leaving the murder scene.

Although the court refused Elliott discovery and an evidentiary hearing, it granted the Warden's motion to dismiss in express and extensive reliance on the Warden's proffered evidence, *see, e.g.*, 652 S.E.2d at 472, and faulted *Elliott* for failing to provide evidence from documents and experts *the state court expressly refused to provide*, *see, e.g., id.* at 477.

For example, Elliott alleged that defense counsel was ineffective for failing to pursue documentation of cell phone tower locations that would confirm that Elliott was in the parking lot of his office at Fort Meade, Maryland, when he made the 5:23 a.m. call to Gragg, and *not* at the restaurant in Gambrills,

Maryland, disposing of bloody bags from the crime scene, as Gragg testified. Prosecutors had provided defense counsel cell phone records with cell tower locations redacted, but counsel never pursued the tower location information. When state habeas counsel sought this information from the telephone company, they learned it had been destroyed in the years after Elliott's trial. HR 5494-95. *Elliott asked the state court for an order enabling him to obtain the unredacted records directly from the police or prosecutor but the state court refused the request.* Despite its refusal, the state court denied Elliott's claim, making the circular argument that Elliott did not provide the documents that had been withheld from him. 652 S.E.2d at 477.

The state court dismissed Elliott's *Brady* claim based on evidence proffered by the Warden that was irrelevant to a *Brady* claim. *See, e.g., Elliott v. Warden*, Respondent's Motion to Dismiss, Exhibits 1 and 2, ¶ 6 (prosecutors' denial of personal knowledge of Thrall's boy's exculpatory statements). *But see Kyles v. Whitley,* 514 U.S. 419, 437 (1995) ("[P]rosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *United States v. Agurs*, 427 U.S. 97, 110 (1976), *Strickler v. Greene*, 527 U.S. 263, 275 n. 12 (1999). The state court also relied on irrelevant hearsay testimony. *See* Respondent's Motion to Dismiss, Exhibit 5 (statement from person who had no personal knowledge of the investigation but simply maintained police department records of

polygraphs). The Warden also proffered and the state court credited hearsay evidence from the prosecutors about what the *police knew* about the suppressed evidence. 652 S.E.2d at 471.

The state habeas court rejected claims that trial counsel failed to obtain evidence that Elliott could not have been at the crime scene at the time of the murders by finding that the "trial transcript . . . demonstrates that [Elliott's] truck was seen in the neighborhood between 4:15 a.m. and 4:25 a.m. and petitioner repeatedly admitted that he was in the area of the murders at that time." *Elliott*, 652 S.E.2d at 473. But the only "evidence" the Warden offered about Elliott's whereabouts was a detective's testimony that Elliott said he was in the area at 3:28 a.m., "relieved himself," drove by the townhouse, and left. HR 1440. Moreover, contrary to the state court's claim, the trial transcript showed that the police officer who saw a truck in the area did not see Elliott's truck. *Compare* HR 1234 and 5630-31 (discrepancies between vehicles).

The state court did not provide Elliott a full and fair hearing of his allegations, allowed him no opportunity to adequately develop materials facts, made factual references not fairly supported by the record, and did not resolve factual disputes in a state court hearing. In these circumstances, the district court was *required* to grant Elliott an evidentiary hearing to develop and present evidence in support of his factual allegations, and to resolve any disputed facts. *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Moreover, the district court failed to follow procedures mandated by FRCP 12(b)(6) when considering the Warden's motion to dismiss. These issues are at the very least debatable, and a COA should issue.

III. A Certificate of Appealability Should Be Granted On Elliott's Claim Regarding a Violation of the Confrontation Clause – the Jurors Should Have Had the Truth

Gragg told jurors that, because she feared Elliott, she was only free to tell the truth after he was taken into custody. HR 1586-87. Gragg failed to reveal, and Elliott was prohibited from telling jurors, that, in truth, after months of telling police she knew nothing, Gragg changed her story on the day police accused her of deception in multiple answers on a polygraph examination. Police then told Gragg that, unless she cooperated, they were going to charge her with capital murder. HR 2227-28, 2232, 2234, and 2243. Faced with this, Gragg began to tell police a story that implicated Elliott, and exculpated her, in the murders.

The trial court refused to allow Elliott to inform jurors of the truth. Although Elliott was allowed to cross-examine Gragg about her prior inconsistent statements, the only explanation for Gragg's change that jurors were allowed to hear was her self-serving claim that she was freed from fears that Elliott would

harm her if she told the truth.[12] The prosecutor harped on this point in closing argument, claiming that Gragg was "scared to death" of Elliott. HR 1945-46.

The impact of the trial court's ruling was exacerbated when Detective Hoffman, testifying on behalf of the prosecution, told jurors that police had arranged for Gragg to be interviewed by a "polygrapher" prior to her testimony. HR 1490-91. Elliott again asserted his right to confront the evidence against him in a manner sufficient to address Gragg's bias and motivation to testify falsely against Elliott. HR 1495-96 and 1499-1502. The state court refused. HR 1506-12. Jurors were told to ignore the detective's comment, but were left with the clear impression that the prosecution had only allowed Gragg to testify after they had successfully screened her testimony with a polygraph examination.

The federal district court ruled that a universal, *per se* prohibition on any reference to a polygraph examination trumped whatever Sixth Amendment Confrontation Clause rights Elliott had, and that the detective's reference to the polygraph did not affect

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[12] Prosecutors, thereby, failed to fulfill their constitutional duties not to stand silent while a witness knowingly provides false or incomplete testimony that might have affected the jurors' decisions. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Bagley*, 473 U.S. 667, 680 (1985).

this prohibition. App. A-59. The court's ruling was, at a minimum, debatable both as a factual matter and as a legal matter, and deserving of further review. This Court should grant certiorari and a COA and remand to the Court of Appeals for appellate review of Elliott's claim.

The district court failed to address the actual arguments Elliott made in support of his claim. Prior to trial, Elliott filed a motion asserting his Sixth Amendment right to confront Gragg's anticipated testimony on behalf of the prosecution with a videotape, audiotape, or transcript of her polygraph examinations. HR 209-10. The motion made clear that ***Elliott did not seek to introduce the results*** of Gragg's polygraphs but only the exculpatory content. HR 210, 673-75 ("I don't think we have to address whether she passed or failed the polygraph, but she clearly is told that she failed it, which becomes a motivating factor for her expressing a new story and that, to me, is relevant with respect to her credibility and admissible under those circumstances."); HR 677 (police told Gragg that, "if she did not tell them something[,] she was likely to be charged. . . . [and t]hat motivated Gragg to tell the story."); and HR 679 (counsel only wanted to ask Gragg whether she was "told [she] failed the polygraph.").

The trial judge would only agree that Elliott could say that police made clear to Gragg "that they

did not believe her version of events, after which she gave another version of events." HR 679.

The state appellate court rejected Elliott's claim because "results of a polygraph examination may not be used to impeach a witness." *Elliott*, 593 S.E.2d at 282.[13] The court also held that the police detective's testimony about Gragg's interview with a polygrapher was properly addressed through a curative instruction to jurors to ignore the detective's answer rather than through more accurate information about the polygraph exam. The appellate court did not address Elliott's distinction about confronting Gragg with police accusations regarding a polygraph examination but *not* with the actual results. HR 674-75.

The district court "agree[d]" with the decision of the state supreme court. App. A-59. As a factual matter, the district court was wrong to find that Elliott's claims should be denied "[i]n light of" a rule precluding the *results* of a polygraph examination. *Id.* All along, Elliott made clear he did *not* seek to admit the results of any polygraph examination. Whether the district court was correct to decide Elliott's claim "[i]n light of [an irrelevant] rule" prohibiting the results of a polygraph examination is, at a minimum, debatable among reasonable jurists.

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[13] The videotape did not contain the actual results of Gragg's polygraph examination.

For similar reasons, the district court erred as a legal matter when it based its decision on a broad, but incorrect, statement of the law: "evidence that a witness has taken a polygraph test is inadmissible." App. A-59-60. Again, "[i]n light of this rule," the district court found no constitutional implications to the trial court's refusal to allow Elliott to conduct cross-examination as requested. *Id.* But state rules about admissibility of evidence must yield to the Confrontation Clause if they undermine a defendant's ability to address a witness's bias or motivation to testify falsely. *See, e.g., Davis v. Alaska,* 415 U.S. 308, 315-16 (1974).

The Sixth Amendment right of a criminal defendant "to be confronted with the witnesses against him" includes the right to impeach credibility through cross-examination. *Id.* at 315-16. Moreover, because bias is "always relevant as discrediting the witness and affecting the weight of his testimony," *id.* at 316, the Confrontation Clause protects a defendant's fundamental right to explore a witness's motivation for testifying.

Indeed, although jurisdictions may have discretion to determine whether to admit the results of polygraph examinations, *United States v. Scheffer*, 523 U.S. 303 (1998), only two courts of appeal place a blanket, *per se* prohibition on *any* reference to a polygraph. *United States v. A&S Council Oil,* 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (and cases cited

therein)[14]; *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974).[15]

In the circumstances presented in Elliott's case, fundamental rights guaranteed by the Confrontation Clause of the Sixth Amendment must override evidentiary limitations on references to a polygraph examination, especially *per se* prohibitions that cannot take into account the constitutional implications of these circumstances. This Court should grant Elliott a COA on this claim and remand the issue for appellate review.

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[14] *A&S Council Oil* actually *allowed* admission of the results of a witness's polygraph examination to cross-examine an expert on the basis for his opinion regarding a witness's credibility. 947 F.2d at 1135.

[15] The Fourth Circuit also has acknowledged that "Circuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority." *A&S Council Oil*, 947 F.2d at 1134 n.4 (*citing United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc)); *Wolfel v. Holbrook*, 823 F.2d 970, 972 (6th Cir. 1987); *United States v. Miller*, 874 F.2d 1255, 1261 (9th Cir. 1989); *United States v. Lynn*, 856 F.2d 430, 432-33 (1st Cir. 1988); *United States v. Gordon*, 688 F.2d 42, 44 (8th Cir. 1982); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987); *United States v. Kampiles*, 609 F.2d 1233, 1245 (7th Cir. 1979) (same); *United States v. Hall*, 805 F.2d 1410, 1415-17 (10th Cir. 1986).

IV. A Certificate of Appealability Should Be Granted on Elliott's Claim That Jurors Were Provided With a Sentencing Form That Violated Elliott's Constitutional Rights

The "imprisonment for life" verdict form in the penalty phase of Elliott's trial clearly misstates Virginia law and runs afoul of the Sixth, Eighth, and Fourteenth Amendments.

Under Virginia law, when the prosecution asks jurors to sentence a defendant convicted of a capital murder to death, it has the burden of proving unanimously and beyond a reasonable doubt the existence of a statutory aggravating circumstance before jurors even can consider a death sentence. Va. Code § 19.2-264.4(C) and (D), App. B-11-12.[16] If even a *single juror* is not satisfied that the evidence establishes beyond a reasonable doubt one of two statutory aggravating circumstances, the defendant is ineligible for death and *must* be sentenced to life imprisonment. Va. Code § 19.2-264.4(E), App. B-12.

The statute also prescribes two capital sentencing verdict forms – one for the death sentence and this one for imprisonment for life:

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[16] The jury in Elliott's first trial rejected the "future dangerousness" aggravating circumstance, so the prosecution in the second trial was limited to trying to prove the second, so-called "vileness" aggravating circumstance.

> We the jury, on the issue joined, having found the defendant guilty (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life or (ii) imprisonment and a fine of $ ___.

Va. Code § 19.2-264.4(D), App. B-12. Instead of using this statutorily prescribed verdict form, Elliott's prosecutors proposed, and defense counsel failed to object to, the following verdict form (the additional language is in **bold**):

> We the jury, on the issue joined, having found the defendant LARRY BILL ELLIOTT, guilty of Capital Murder in that he did willfully, deliberately and premeditatedly kill more than one person as part of the same act or transaction, and having considered all the evidence in aggravation and mitigation of the offense **and having unanimously found the the [sic] evidence fails to establish beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture; and/or depravity of mind; and/or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder**, fix his punishment at: ___ Imprisonment for life, OR ___ Imprisonment for life, and a fine of $ ___.

HR 5626, App. C-1. Under this verdict form jurors were *misinformed* that they had to be unanimous in finding that the evidence *failed* to establish Elliott's *eligibility* for a death sentence in order for Elliott to be sentenced to imprisonment for life. This error fundamentally distorted jurors' deliberations.

Under Virginia law, Elliott's jurors had three possible responses to the evidence:

1. Unanimously find that the evidence established beyond reasonable doubt that at least one statutory aggravating circumstance existed and unanimously determine to sentence Elliott to death;

2. Unanimously find that the evidence established beyond reasonable doubt that at least one statutory aggravating circumstance existed and unanimously determine to sentence Elliott to imprisonment for life; or

3. Fail to unanimously find that the evidence established beyond reasonable doubt that at least one statutory aggravating circumstance existed.[17]

The impact of the erroneous verdict on these responses is plain: although Virginia law prescribes

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[17] In this circumstance, jurors would simply report their failure to reach unanimity regarding the existence of an aggravating circumstance. The trial judge would be required by statute to sentence Elliott to life imprisonment. Va. Code § 19.2-264.4(E), App. B-12.

that failure to convince even a single juror that the evidence established an aggravating circumstance beyond a reasonable doubt renders a capital defendant ineligible for a death sentence, Elliott was required to convince *all twelve jurors* before his ineligibility would be recognized.

The district court erroneously transferred and inverted the unanimity requirement from the jurors' *selection* phase decision to its *eligibility* phase decision, noting that Virginia "juries must decide criminal cases and sentencing by unanimous verdict." App. A-48;[18] *but see Tuilaepa v. California*, 512 U.S. 967, 971 (1994); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). A requirement that jurors must be unanimous in order to find that the *evidence failed to establish* an aggravating factor, eliminates the requirement that jurors must be unanimous in order to find that the *evidence established* an aggravating factor.

In circumstances where jurors were not unanimous in finding that the evidence of aggravating circumstances was established beyond a reasonable

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[18] The district court cited to the habeas decision of the Supreme Court of Virginia which based its assessment of counsel's performance on the unreasonable finding that the verdict forms "follow[ed] the statute and have previously been approved by this Court." *Elliott*, 652 S.E.2d at 486. But the verdict forms provided in Elliott's case plainly do not follow the governing statute, as shown above, and the state court failed to cite any previous opinion, much less one that approved the erroneous verdict form. *Id.*

doubt, this error would nullify the constitutionally-required narrowing impact of the aggravating factor requirement, and deprive a capital defendant, in violation of due process, of the statutory requirement that, in such a circumstance, he be given a mandatory life sentence. *Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980); *see also Murtishaw v. Woodford*, 255 F.3d 926, 969-70 (9th Cir. 2001); *Rojem v. Gibson*, 245 F.3d 1130 (10th Cir. 2001); *Carter v. Bowersox,* 265 F.3d 705, 715-16 (8th Cir. 2001). It also means that a juror who finds mitigating evidence sufficient to rebut the establishment of an aggravating circumstance beyond a reasonable doubt is unable to give effect to the mitigating evidence. *Mills v. Maryland*, 486 U.S. 367 (1998); *cf. Smith v. Spisak*, 129 S. Ct. 1319 (Feb. 23, 2009) (Order granting writ of certiorari).

As in *Carter,* "it does not take speculation to find that there is a reasonable probability that the result of the sentencing phase would have been different had [Elliott's] jury been" given the proper verdict forms. 265 F.3d at 716. Elliott's jurors' question about imposition of a fine provided clear evidence that jurors were considering imposing a life sentence – fines only applied to the verdict form for imprisonment for life. HR 2093; *see Powell v. Commonwealth*, 552 S.E.2d 344, 362 n.14 (Va. 2001) (noting fines can't be assessed in conjunction with the death penalty).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should grant a Certificate of Appealability.

Respectfully submitted,

THOMAS E. KELLY, JR.
JOANNE M. HEPBURN
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
Telephone: (206) 370-6683
Facsimile: (206) 623-7022

STANFORD PURSER
K&L GATES LLP
1717 Main St., Suite 2800
Dallas, TX 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-6100

ROBERT LEE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
Telephone: (434) 817-2970
Facsimile: (434) 817-2972

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson St.
Tallahassee, FL 32301
Telephone: (850) 224-0004
Facsimile: (850) 224-3331

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-5
(1:08-cv-00430-LO-JFA)

LARRY BILL ELLIOTT,

Petitioner-Appellant

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,

Respondent-Appellee

ORDER

(Jun. 10, 2009)

Upon review of submissions relative to the appellant's motion for certificate of appealability, the court denies a certificate of appealability and dismisses the appeal.

Entered at the direction of Judge Motz with the concurrence of Judge King and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

2009 WL 855796 (E.D.Va.)

United States District Court, E.D. Virginia,
Alexandria Division.
Larry Bill ELLIOTT, Petitioner,
v.
Loretta K. KELLY, Respondent.
No. 1:08cv430.

March 31, 2009.

Robert Edward Lee, Jr., Charlottesville, VA, for Petitioner.

Matthew P. Dullaghan, Office of the Attorney General, Richmond, VA, for Respondent.

MEMORANDUM OPINION

LIAM O'GRADY, District Judge.

Petitioner **Larry Bill Elliott** was convicted of the capital murder of Dana Thrall, the first degree murder of Robert A. Finch, and of firearm offenses relating to these murders. After the first trial ended in mistrial, a second trial was held in the Circuit Court of Prince William County from March 23 to April 4, 2003. The jury returned guilty verdicts on all counts. After a separate sentencing proceeding on April 4, 2003, the jury sentenced Elliott to death for the murder of Dana Thrall, to life imprisonment for the murder of Robert Finch, and to eight years total imprisonment for the firearms offenses. The jury based the death sentence on the "vileness" aggravating factor for the murder of Dana Thrall. On May

22, 2003, the trial court imposed its sentence in accord with the jury's verdicts, and entered final judgment on June 13, 2003. After unsuccessfully challenging the imposition of the death penalty on both direct appeal and in state collateral proceedings, Elliott now petitions the Court on writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the Court is the Petition for Writ of Habeas Corpus (Dkt. No. 22), Respondent's Motion to Dismiss (Dkt.Nos.26), as well as other motions pertaining to this appeal. For the reasons stated in the following memorandum opinion, it is hereby ORDERED that Respondent's Motion to Dismiss is GRANTED, Elliott's Petition for Writ of Habeas Corpus is DISMISSED in full, and the remaining motions are deemed MOOT.

I. Facts

The following recitation of essential facts is taken verbatim from the direct appeal decision of the Supreme Court of Virginia, *Elliott v. Commonwealth*, 267 Va. 396, 593 S.E.2d 270, 273-278 (Va.2004):

> At approximately 4:00 a.m. on the morning of January 2, 2001, Mary Bracewell, a newspaper delivery person, was traveling her route in the Woodbridge community of Prince William County, Virginia. Bracewell was aware that there had been several recent vehicle break-ins in the neighborhood and became suspicious when she saw a man standing beside a pick-up truck parked on Belfry Lane. Bracewell observed the man,

who appeared to be carrying a flashlight, walk to the north end of Belfry Lane, cross the street, walk onto a grassy area between two townhouses, and then disappear from her view. Bracewell called police on her cellular telephone to report her observations.

At 4:15 a.m., Officer Marshall T. Daniel of the Prince William County Police Department received a radio dispatch directing him to respond to Bracewell's call. He arrived at Belfry Lane three minutes later. Bracewell indicated the parked pick-up truck to Daniel and related to him what she had observed. Daniel noted that the pick-up truck, which was locked, had a Department of Defense windshield identification sticker and that there was a cellular telephone on the passenger seat.

At 4:27 a.m., Officer Daniel received a radio call to respond to a report of a domestic disturbance at a townhouse located at 3406 Jousters Way. Jousters Way is located approximately 300 yards north of Belfry Lane. Although the two streets do not intersect, one can reach Jousters Way on foot from Belfry Lane by walking in the same direction that Bracewell had seen the man beside the pick-up truck walking.

Tina Miller, who lived in an adjoining townhouse, had made the report of a domestic disturbance at 3406 Jousters Way. Miller telephoned police after being awakened by a crashing sound coming from 3406 Jousters

Way at approximately 4:20 a.m. As she placed the call, Miller heard three or four "hollow" sounds followed by "the most horrible scream" she had ever heard. Miller thought that the screaming voice sounded like that of Thrall, one of the occupants of 3406 Jousters Way.

Tommy Young, who lived in a townhouse on the opposite side of the street from 3406 Jousters Way, was walking his dog in front of his home at about the same time Miller was awakened by the crashing sound. Young heard two loud "banging noises" coming from 3406 Jousters Way, followed by the sound of a female scream and three more banging noises. Young went back to his house and told his wife to call the police. A few minutes later, Young looked out his front window and saw that the front storm door of 3406 Jousters Way, which had earlier been closed, was swaying back and forth. Young also noted that the front window shades of the home, which were normally left half-drawn, were fully closed.

Officer Scott Bigger of the Prince William County Police Department arrived at 3406 Jousters Way at 4:25 a.m. Officer Bigger knocked on the front door, but got no response. Officer Daniel arrived a few minutes later and walked around to the back of the townhouse. The backyard was enclosed by a privacy fence, and Officer Daniel could hear a large dog barking "pretty hysterically, angry" inside the yard.

Returning to the front of the home, Officer Daniel observed that Officer Bigger had still received no response to his knocking on the front door. Looking through a gap between the shades of a front window, Officer Daniel was able to see the legs of a person lying prone and motionless in the foyer of the home. Officer Bigger opened the unlocked front door and he and Officer Daniel saw Finch, who lived with Thrall in the home, lying on the floor dead. Finch had suffered three gunshot wounds: one to his head, one to his back, and one to his chest.

Officer Daniel immediately returned to the back of the home to secure that area while Officer Bigger waited at the front of the home for additional officers to arrive. When those officers arrived, Officer Daniel immediately returned to the location on Belfry Lane where the pick-up truck had been parked. He arrived at that location at 4:38 a.m. The truck was gone.

Officer Sheldon R. Creamer, one of the officers who had responded to the call by the other officers for assistance, arrived at 3406 Jousters Way at approximately 4:45 a.m. Entering the home, he heard "a muffled breathing sound" coming from the kitchen at the back of the home. In the kitchen he found Thrall, shot and lying in a pool of blood. Emergency medical personal called to the scene took Thrall by ambulance to a helicopter, which in turn evacuated her to the Washington Hospital Center in the District

of Columbia, where she later died. Thrall had suffered multiple gunshot wounds including a defensive wound to her right hand, three to her head, and one to her chest. She also suffered a blunt force trauma to the back of her head consistent with a pistol-whipping.

Officer Creamer found that the backdoor was locked by its doorknob lock, but that the door's deadbolt lock was not engaged. He could hear the dog barking in the back yard. Entering the yard from the kitchen, Officer Creamer found that the dog had calmed down. He then determined that the gate of the privacy fence was secured with a locked padlock.

Meanwhile, because Officer Daniel had reported seeing a child looking out of a second floor back window, Officer Bigger reentered the home and went upstairs. There he found Thrall's two sons, aged six and four, who were crying and upset. Police officers removed the children from the home.

The Investigation:

Officer Thomas Leo . . . found a bloodstain on the inside of the gate of the privacy fence. Subsequent DNA testing of this sample showed that it was consistent with Elliott's DNA to a degree that a match would occur "once in the entire world population."

Although a murder weapon was never recovered, forensic testing of ten bullets

recovered from the home and during the autopsies of Thrall and Finch confirmed that all had been fired by the same weapon. The bullets were of a type used only in a revolver-type handgun. Gary Arnsten, a firearms expert with Virginia's Division of Forensic Science, testified at trial that because no weapon of this type could hold more than five or six bullets in its revolving chamber, he was certain that the weapon had been reloaded during the commission of the murders.

Detective Charles Hoffman . . . [was] informed . . . that Finch had a prior romantic relationship with Rebecca Gragg . . .

Detective Hoffman and another detective traveled to Fort Meade in Hanover, Maryland, where Elliott worked as a civilian employee for the United States Army as a counterintelligence expert . . . The detectives located the truck in a parking lot at Fort Meade, and Detective Hoffman observed that there was a flashlight, a cellular telephone, and a box of bandages on the seat of the truck.

Elliott told the detectives that Gragg was an employee at a brewing company he owned in West Virginia. He admitted that he had supplied Gragg with a credit card in the name of "Rebecca L. Elliott," but maintained that this had been for business purposes. He also told the detectives that he had been traveling over the New Year's holiday, as had

Gragg, and that during that time he had spoken with her several times on his cellular telephone in an effort to arrange a business meeting with her.

Elliott told the detectives that he was aware that Gragg and Finch were involved in a dispute regarding the custody of their two children. Elliott related that Gragg had traveled to Florida over the New Year's holiday and had taken the children with her. He further related that Gragg had told him that she was having car trouble and would not be able to return to Virginia with the children in time to return them to Finch at 2:00 p.m. on New Year's Day as she was required to do under a visitation agreement. Elliott claimed that he had driven to Gragg's residence in the early afternoon of New Year's Day "in case Robert Finch showed up so that [Elliott] could explain to him the problems Rebecca was having with getting back." Elliott denied he had any relationship with Gragg other than as her employer. He also denied knowing Finch and claimed that he had seen him only once.

Although Detective Hoffman told Elliott that his truck had been seen in Finch's neighborhood in the early morning hours of the day of the murders, Elliott denied having been in the area. Elliott claimed that he had spent the night of January first to second sleeping in his truck at a rest area in Maryland . . .

Elliott [later] admitted the true nature of his involvement with Gragg . . . Elliott further admitted that he knew where Finch lived and that, after he had gone to Gragg's house on the afternoon of January 1, 2001, he had driven to Finch's house. He denied getting out of his truck, however, and claimed that he had seen "a black man with a slinky walk going to the front door of the home." . . .

Elliott admitted that after calling Gragg, he drove to Finch's neighborhood. He admitted leaving his truck, claiming that he did so only because he needed to urinate. Elliott stated that after urinating by a guardrail on the side of the road, he walked by Thrall's and Finch's townhouse. He denied going onto the property and stated that he had not heard gunshots, a scream, or anything unusual. At the conclusion of this interview, Detective Hoffman took a photograph of an abrasion he had noticed on one of Elliott's hands.

On January 4, 2001, Gragg, . . . admitted receiving a telephone call early on the morning of the murders, but claimed that the call had come from Finch. Gragg claimed that Finch had threatened to call the police if she did not return their children to him that afternoon. Gragg also told the detectives that she did not believe that Elliott had committed the murders.

On January 7, 2001, . . . Elliott admitted that he had been in Finch's neighborhood "hundreds of times." . . .

On January 8, 2001, . . . testing of samples collected from the underside of the truck's floor mats showed a trace residue of blood, though the samples were too small for accurate DNA testing. A further blood sample found in the seat cushion was consistent with Elliott's DNA . . .

On May 10, 2001, . . . Gragg told the police that the telephone call she had received early on the morning of the murders was not from Finch, although initially she had assumed it was because the connection was not good and she could not hear the caller clearly. Gragg then related that when the caller realized that she thought she was talking to Finch, the caller said he was "tired of this s * * * and was going to take care of it" and hung up. Gragg then realized that the call had come from Elliott . . .

Elliott told her that "all of our problems had been taken care of." . . . Later, Elliott told Gragg that he was looking for a place "to dump . . . these bloodied black trash bags from the mess that Jerry had made."

Gragg told the police that she had not been truthful in her prior interviews because she was afraid of Elliott and "Jerry," because Elliott had once told her that "Jerry" was watching her and that he would kill her or her family if she went to the police. Once

> Elliott was in custody and the police had assured her that there was no "Jerry," she stated that she had decided to be truthful. Gragg's attorney confirmed that she had told him on several occasions that she feared Elliott would harm her if she told the police what she knew.

II. Procedural History

Elliott was charged in Prince William County Circuit Court with the Capital Murder of Dana Thrall, under Va.Code § 18.2-31 (killing of more than one person as part of the same act or transaction); First Degree Murder of Robert Finch, under Va.Code § 18.2-32; and with two firearm offenses related to the murders. Elliott's first jury trial, from July 15 to July 31, 2002, ended in a mistrial. He was convicted on all counts after a second trial from March 23 to April 4, 2003.

Elliott filed appeals of his convictions, which were consolidated and heard by automatic priority appeal before the Virginia Supreme Court. On March 5, 2004, the Virginia Supreme Court affirmed Elliott's convictions and the sentence of death in an extensive opinion. *See Elliott v. Commonwealth,* 267 Va. 396, 593 S.E.2d 270 (Va.2004). Thereafter, Elliott sought a writ of certiorari in the Supreme Court of the United States, which the Supreme Court denied on January 10, 2005. *See Elliott v. Virginia,* 543 U.S. 1081, 125 S.Ct. 875, 160 L.Ed.2d 825 (2005).

On March 11, 2005, Elliott filed a 74-page original petition for writ of habeas corpus in the Virginia Supreme Court. After the Virginia Supreme Court denied his motion for leave to exceed the page limits, Elliott filed his 50-page petition, with 49 supporting affidavits, and the Warden moved to dismiss. Elliott filed a number of discovery motions in June 2006, including a Motion for Preservation and Transfer of Evidence Pursuant to Virginia Code § 18.2-270.4:1. The Prince William County Circuit Court conducted a hearing on this motion on July 8, 2006, and ordered preservation of human biological evidence on August 11, 2005. On April 24, 2006, Elliott filed with the Virginia Supreme Court a Petition for a Writ of Mandamus to the Circuit Court, asking for an order to transfer to the Virginia Department of Forensic Sciences all human biological evidence from the murders that had been collected by any government entity. On August 1, 2006, the Virginia Supreme Court dismissed the petition. After Elliott moved for an order requiring the Prince William County police and Commonwealth's Attorney to comply with the August 11, 2005 order, the Circuit Court held another evidentiary hearing on November 28-29, 2006. At the conclusion of this hearing, the Circuit Court ordered the police department to transfer all physical evidence in the case to the Division of Forensic Science.

On November 2, 2007, the Virginia Supreme Court dismissed Elliott's petition and denied Elliott's related discovery motions. *Elliott v. Warden of Sussex,*

593 S.E.2d 465 (Va.2007). On March 6, 2008, the Virginia Supreme Court denied Elliott's Petition for Rehearing. On May 6, 2008, this Court stayed Elliott's execution, and granted Elliott's request to file a Petition for Writ of Habeas Corpus. On July 3, 2008, Elliott filed his Petition for Writ of Habeas Corpus in this Court. Elliott's petition sets out the numerous grounds for relief, which are summarized in short form as follows:

A. Counsel Rendered Ineffective Assistance at Guilt Phase.

1. Failure to Interview or Call Alibi Witnesses.

2. Failure to Obtain Business Records and Failure to Call Experts.

3. Failure to Interview and/or Call Witnesses Regarding the Cleaning of Elliott's Truck.

4. Failure to Interview and/or Call Witnesses Regarding Evidence of other Suspects.

5. Failure to Call Larry Smith.

6. Failure to Interview and/or Call Witnesses Regarding Silencers.

7. Failure to Interview and/or Call Witnesses as to Elliott's Peacefulness and Nonviolence.

8. Counsel Unreasonably Failed to Investigate and Prepare for Trial

9. Failure to Object During Opening.

10. Promising Jury It Would Play Tape and Not Playing It.

11. Portraying Gragg as the Actual Murderer.

12. Failure to Adequately Address the Blood on the Back Gate.

13. Failure to Object to Inadmissible, Prejudicial Evidence of Uncharged Crimes and of Collateral Events.

14. Failure to Effectively Move for a Dismissal.

15. Failure to Put on a Defense.

16. Failure to Object to the Prosecution's Improper Closing Arguments.

17. Cumulative Prejudice to Elliott.

B. Counsel Rendered Ineffective Assistance at the Penalty Phase.

1. Failure to Adequately Develop and Present Mitigation Evidence.

2. Failure to Renew Penalty Phase Motions Raised in Trial 1.

3. Failure to Object to Improper and Prejudicial Victim Impact Testimony.

4. Failure to Object to Prosecution's Improper Closing Arguments.

5. Failure to Seek Continuance or Other Relief Based on the Pre-Sentence Report.

6. Cumulative Effect of Counsel's Ineffective Assistance in the Penalty Phase Prejudiced Elliott.

C. Claims Relating to the Jury Instructions/Verdict Forms.

1. The Failure to Request the "Mere Presence" Instruction at Guilt Phase.

2. The Absence of the "Triggerman" Instruction at Guilt Phase.

3. Failure to Object to the Capital Murder Instruction and its Verdict Form at Guilt Phase.

4. Failure to Object to the Verdict Form for the Finch Murder at Guilt Phase.

5. Failure to Request a Victim Impact Testimony Instruction at Penalty Phase.

6. Errors in Signed Capital Murder Verdict Form at Penalty Phase.

7. Failure to Provide Proper Verdict Form For the "Life In Prison" Sentence at Penalty Phase.

8. Multiple Assignments of Errors and Claims Regarding Instruction No. 1 and the Signed Capital Verdict Form at Penalty Phase.

9. Failure to Request Instructions that the "Defendant is Presumed Innocent of the Aggravating Factors," that "He Does Not Have to Testify In the Penalty Phase, and On the Definition of "Reasonable Doubt."

D. Counsel Rendered Ineffective Assistance On Direct Appeal.

1. Failure to Assign Error to the Evidentiary Penalty Phase of Trial.

2. Failure to Argue Assignments of Error.

3. Failure to Cite Authority Requiring the Adoption of a Narrowing Instruction Regarding the Three Vileness Factors.

4. Failure to Argue that the Jury's Verdict was not the Product of a Reasoned and Dispassionate Deliberation.

E. Cumulative Effect of all Preceding Ineffective Assistance of Counsel Claims.

F. The Handwritten Note Found in the Appellate Record.

G. The Post-trial Destruction and/or Release of Human Biological Evidence Violated Elliott's Due Process Rights.

H. The Exclusion of Polygraph Evidence Violated Elliott's Right to Confront Witnesses.

I. Claims Found Procedurally Defaulted By the Virginia Supreme Court.

a. Claims under *Brady v. Maryland.*

1. Failure to Produce Statements of the Thrall boys.

2. Failure to Produce Photographs Provided by Victim Robert Finch's Parents.

3. Failure to Produce Alleged Tape Recording of "the Smoke Break Conversation" and Statements Regarding that Conversation.

4. Failure to Produce Third Polygraph Report.

5. Failure to Comply With Constitutional Duties.

6. Cumulative Materiality.

b. Claims under *Napue/Giglio.*

1. The Commonwealth Sponsored Perjured Testimony from Officer Leo.

2. The Commonwealth Sponsored Perjured Testimony from Detective Hoffman and Gragg.

3. The Alleged May 10, 2001 Written Statement.

c. Miscarriage of Justice.

III. Standard of Review

The federal habeas statute, the Antiterrorism and Effective Death Penalty Act (AEDPA), provides

"a highly deferential standard for evaluating state court rulings." *Bell v. Cone,* 543 U.S. 447, 455, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005). This deferential standard strictly constrains federal review of a petition for habeas relief from a state conviction and sentence. Specifically, the federal habeas statute mandates that federal habeas relief is only proper when state court proceedings:

> i) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> ii) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has interpreted these provisions as requiring considerable deference upon federal review of state court proceedings. A state court decision is "contrary to" clearly established Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or confronts facts "materially indistinguishable" from a Supreme Court decision and arrives at a result different than that dictated by Supreme Court precedent. *See Williams v. Taylor,* 529 U.S. 362, 405-406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Lovitt v. True,* 403 F.3d

171, 178 (4th Cir.2005). Similarly, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 178 (quoting *Williams,* 529 U.S. at 411). An application of federal law is unreasonable when the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of [a] petitioner's case." *See Lenz v. Washington,* 444 F.3d 295, 300 (4th Cir.2006) (quoting *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)).

Furthermore, on federal habeas review, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." *Miller-El v. Cockrell,* 537 U.S. 322, 324, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The court must presume a factual determination made by the state court to be correct unless the habeas petitioner rebuts the presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

These established principles provide the framework upon which this Court reviews Elliott's habeas claims.

IV. Merits Review

A. Counsel Rendered Ineffective Assistance at Guilt Phase.

Elliott asserts seventeen grounds for ineffective assistance of counsel at the guilt phase of his trial, and eight grounds for ineffective assistance at the penalty phase of trial. Under *Strickland v. Washington,* a successful claim for ineffective assistance of counsel requires proof that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance of counsel prejudiced the defense. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the "performance" prong of the *Strickland* test, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. Under the "prejudice" prong of the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

On state habeas appeal, the Virginia Supreme Court rejected each of Elliott's claims for ineffective assistance of counsel. *See Elliott v. Warden of Sussex,*

593 S.E.2d 465, 473-489 (Va.2007). Upon careful review of the record and transcripts, this Court agrees with the Virginia Supreme Court that Elliott has not shown ineffective assistance of counsel, and dismisses these claims for the reasons detailed below.

1. *Failure to interview or call alibi witnesses.*

Elliott argues that counsel failed to call three alibi witnesses, his co-worker Todd Prach, his wife Kathy Elliott, and his daughter Kaitlynn Elliott. According to Elliott, Mr. Prach would have testified that he spoke with Elliott between 5:00 and 5:30 a.m. on the morning of the murders at their workplace at Fort Meade, Maryland. This testimony allegedly would have refuted the Commonwealth's theory of the case because Elliott could not have committed the murders, cleaned up, disposed of the evidence, and arrived at Fort Meade by 5:30 a.m.

The Court agrees with the Virginia Supreme Court that this claim fails to satisfy the "prejudice" prong of *Strickland*. *Elliott v. Warden*, 652 S.E.2d at 473. The record shows that Elliott's truck was seen in the neighborhood as early as 4:15 a.m. on the morning of the murders and that he was no longer in the house when police responded at 4:25 a.m., and he admitted he was in the neighborhood at the time of the murders. There was no testimony at trial as to how long he spent cleaning the crime scene or disposing of evidence, or exactly when he did so. Even

had Mr. Prach testified that he saw Elliott between 5:15 and 5:30 a.m. at Fort Meade, there was sufficient time for Elliott to drive to Fort Meade after the murders. In short, there is no irreconcilable conflict with the timeline presented at trial, and therefore there is not a reasonable probability that the result at trial would have been different but for counsel's decision not to call Mr. Prach. *Strickland,* 466 U.S. at 687.

Elliott's wife, Kathy Elliott, allegedly would have testified that she saw him in their home around 6:00 a.m. on the morning of the murders. She allegedly would have testified that Elliott returned from travel that morning, that she watched him unload his truck and saw no sign of blood or a cleanup of a crime scene, and that his customary practice was to shower upon return from a trip. But Kathy Elliott's own affidavit stated that Elliott showered and did laundry immediately after arrival, which supported an inference that he did so in order to remove evidence linking him to the murders. The prosecution theory at trial was that Elliott cleaned up his truck and disposed of the evidence prior to his arrival at home at 6 a.m., which is consistent with Kathy Elliott's proffered testimony. And, as the Virginia Supreme Court noted, because Elliott had defrauded his wife out of savings – acting in concert with another woman – defense counsel hardly can be faulted for not calling her as a witness given her potential bias. *Elliott v. Warden,* 652 S.E.2d at 474.

Kaitlynn Elliott's proffered testimony was not relevant. Kaitlynn Elliott did not see her father until hours after the murders – around 7:15 a.m. – leaving plenty of time for him to dispose of trash bags and clean his truck. Moreover, her affidavit does not square with evidence that his truck had a hard cover that blocked the truck bed from view. Finally, Elliott certainly knew the substance of the testimony his wife and daughter now proffer, and cannot now fault his counsel for failing to call alibi witnesses he failed to bring to counsel's attention.

2. *Failure to Obtain Business Records and Failure to Call Experts.*

Elliott claims that counsel failed to obtain exculpatory records, including: cell phone tower records for Gragg's and Elliott's cell phones, to demonstrate which cell towers were used to send and receive calls. Elliott contends this was critical because without the cell tower records, he was unable to prove that he made a 5:23 a.m. phone call from his office parking lot, not Kaufman's Restaurant, which was 6.6 miles away; Thrall and Finch's bank and other financial records, which supposedly would have shown that Finch lacked a legitimate source of funds to purchase a $300,000 house; and medical records from the hospital where Finch received treatment after being beaten by Gragg's friends and relatives. Elliott also asserts ineffective assistance because counsel failed to call a crime scene/blood spatter reconstruction expert, who allegedly would have provided evidence

supporting an inference that multiple persons committed the murders.

The Virginia Supreme Court rejected each of these claims, holding that they satisfied neither the "performance" nor the "prejudice" prongs of *Strickland*. It found that Elliott merely speculated as to what the cell phone records and financial statements would have shown, which did not support an ineffective assistance claim. As to the failure to call a blood spatter expert, the Virginia Supreme Court rejected the theory of multiple killers as being inconsistent with the crime scene evidence showing that each bullet was fired from the same gun. *Elliott v. Warden,* 652 S.E.2d at 476-477.

This Court agrees. The Court does not see the relevance of Finch's medical records showing that he received hospital treatment, or the relevance of Finch and Thrall's financial records. The blood spatter expert would not have rebutted the evidence that a single gun was used in the killings, nor would it have rebutted the fact that Elliott's blood and DNA was found on the back fence behind the house. Thus, the Court holds that these claims fail under *Strickland*.

3. *Failure to Interview and/or Call Witnesses Regarding the Cleaning of Elliott's Truck.*

Elliott argues that counsel erred by failing to call several witnesses, including his wife Kathy Elliott and his former wife Sandy Rooks, who would have

testified to his lifelong habit of compulsively cleaning his vehicles. His friends Chris McSpadden and Robert Barrow allegedly would have testified that beer was spilled in his truck at a tailgate party a few days before the murders, which would have provided an alternative explanation for why Elliott cleaned his truck mitigated or negated the inference that he cleaned the truck to destroy evidence.

The Virginia Supreme Court found that such testimony would have bolstered the Commonwealth's case by reinforcing expert testimony that a thorough, recent cleaning of the truck could have removed any evidence of crimes. 652 S.E.2d at 475. Moreover, the purported testimony that Elliott cleaned his truck days prior to the murders is not probative as to whether he cleaned his truck immediately after the murders to destroy evidence. *Id.* This Court agrees with the Virginia Supreme Court that these claims fail to demonstrate ineffective assistance of counsel under *Strickland.*

4. *Failure to Interview and/or Call Witnesses Regarding Evidence of Other Suspects.*

Elliott contends that counsel was ineffective for failing to introduce evidence of other suspects, such as Gregg's [sic] husband and relatives, who supposedly had a motive to kill Finch. Elliott proffers that Finch had been beaten by Gragg's relatives and argues that these relatives should have been investigated as suspects. Jennifer Finch, the victim's sister, allegedly

would have testified that her inspection of her brother's home after the murders revealed a missing computer, drug paraphernalia, and missing cash. William Thrall, the other victim's father, allegedly would have testified that he found drug paraphernalia at the house, and that the police refused to investigate further.

The Virginia Supreme Court found that these claims satisfied neither prong of the *Strickland* test because the trial court found no evidence of third party involvement and thus testimony on alternative theories would not have been admissible under *Johnson v. Commonwealth,* 259 Va. 654, 529 S.E.2d 769 (2000), *cert. denied,* 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000); *Elliott v. Warden,* 652 S.E.2d at 475. This finding was affirmed on direct appeal. *Elliott v. Commonwealth,* 593 S.E.2d at 287-88. This Court agrees. Elliott is merely postulating that others might have had motives to kill Finch. Even if admitted, none of this purported testimony or evidence would have given the jury a sound evidentiary basis for concluding that another suspect committed the murders. Accordingly, it was not ineffective assistance for counsel not to introduce these witnesses, and these claims are denied.

5. *Failure to Call Larry Smith.*

Counsel did not call Larry Smith, a friend of Finch who bred Finch's 150 pound Mastiff dog. Smith allegedly would have testified to various things Finch

told him about his finances, that Finch kept a lot of money around the house and that he trained Finch's Mastiff and knew the dog was prone to biting intruders. Elliott argues that this testimony, if admitted, would have undermined the prosecution theory that he went out the back door past the Mastiff and left his blood on the back gate.

The jury's conviction rested in part on unimpeachable DNA evidence – his blood on the gate – that Finch was in the backyard near the time of the murders. Nor would Smith's testimony about the dog have undermined confidence in the verdict, given the testimony from Officer Creamer that he entered the backyard without rousing the dog. Much of Smith's proffered testimony amounts to inadmissible hearsay, and the remainder of it (*e.g.*, Finch kept a lot of money around the house) was not prejudicial to Elliott. Moreover, the fact that Smith testified at the first trial, but not the second, gives rise to an inference that counsel had tactical reasons for not calling him again. *Strickland,* 466 U.S. at 689. As such, this Court joins the Virginia Supreme Court in rejecting these claims. *Elliott v. Warden,* 652 S.E.2d at 476.

6. *Failure to Interview and/or Call Witnesses Regarding Silencers.*

Five days before the murders, Elliott emailed Mr. Randon Jackson urgently seeking to acquire a silencer, allegedly for use at a shooting range. Mr.

Jackson testified that using silencers at a shooting range was "ludicrous" and "silly." Elliott now claims that counsel should have called witnesses who would have testified that he had conversations with them regarding silencers at a shooting range. This might have discredited the prosecution's theory that Elliott was seeking silencers to use in the murders and using the shooting range as a pretext for acquiring the silencers in his emails with Mr. Jackson. The affidavits of two of Elliott's witnesses, Mr. Robert Booher and Mr. David Dyke, mentioned nothing about communicating with Elliott regarding silencers. Mr. McSpadden's affidavit mentions conversations about shooting ranges, generally, but does not specifically aver that he discussed obtaining silencers with Elliott or that Elliott was the one who mentioned silencers for use at shooting ranges. None of this testimony would have undermined the prosecution's evidence that Elliott sought silencers from Mr. Jackson five days before the murders, or the inference that he used the pretextual purpose of a shooting range. The Court concludes that these claims do not satisfy the "performance" or "prejudice" prongs of *Strickland*.

7. *Failure to Interview and/or Call Witnesses as to Elliott's Peacefulness and Nonviolence.*

Elliott claims that counsel erred by failing to call various witnesses to testify as to his reputation for peacefulness and non-violence. He claimed that 15

such witnesses were identified in the habeas investigation, and that with such testimony Elliott would be entitled to a jury instruction that his character be considered in determining guilt or innocence. The Virginia Supreme Court found that these claims failed both prongs of *Strickland*. 652 S.E.2d at 476. The Court agrees. Given the overwhelming evidence of Elliott's commission of these murders, including the DNA evidence on the back gate and witness testimony and his own admissions placing him at the scene at the time of the murders, there is no reason to believe that the result at trial would have been changed by character testimony. This is particularly true given that these character witnesses did not know about his other life with Gragg, or how he and Gragg conspired to defraud his wife. As the Virginia Supreme Court put it, "petitioner cannot demonstrate that testimony as to petitioner's reputation in those limited areas of his life would have had any significant impact on the jury's decision." *Id.* Accordingly, the claims fail both the performance and prejudice prongs of *Strickland*.

8. *Counsel Unreasonably Failed to Investigate and Prepare for Trial.*

Elliott claims that his counsel failed to adequately prepare for the second trial by failing to adequately investigate or to effectively counter the prosecution's trial strategy. This Court is mindful of the Supreme Court's admonition that "[j]udicial scrutiny of counsel's performance must be highly

deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland,* 466 U.S. at 689. In light of this high burden, a habeas petitioner cannot prevail on general or boilerplate claims that counsel was ineffective because he or she did not "effectively counter" the opposition's trial strategy. Elliott points to no case holding that counsel was ineffective because he or she failed to effectively counter the prosecution's trial strategy at a second trial after an initial mistrial. Further, Elliott's assertion that his counsel failed to investigate for the second trial ignores the fact that Mr. William Moffitt was his counsel at both trials, and therefore could rely on his investigation from the first trial. Counsel are not required to duplicate investigative work to avoid being ineffective. Accordingly, this claim must be denied.

9. *Failure to Object During Opening.*

Elliott next asserts ineffective assistance because his counsel failed to object during the prosecution's opening statement, which "speculated about elements of the crimes that were never supported by evidence." He lists several examples of objectionable statements during the opening, such as "Dana [Thrall] was murdered because she . . . witnessed the execution of Finch." The evidence at trial, however, supported an

inference that Elliott's motive for killing Ms. Thrall was that she witnessed him shooting Finch. Elliott also argues that the prosecution accused him of crimes other than the ones charged in the indictment, such as stealing from his wife. Under Virginia law, however, the Commonwealth is allowed to show evidence of other crimes "if the evidence is connected with or leads up to the offense for which the accused is on trial." *Woodfin v. Commonwealth,* 236 Va. 89, 372 S.E.2d 377, 380-381 (Va.1988). Therefore this Court agrees with the Virginia Supreme Court that the "record . . . demonstrates that the Commonwealth's opening statement constituted a fair depiction of the evidence to be presented and a fair inference of what the evidence would prove and, thus, was not objectionable." *Elliott v. Warden,* 652 S.E.2d at 477.

10. *Promising Jury It Would Play Tape and Not Playing It.*

Elliott's counsel promised during opening statement to play an audio tape of a phone conversation between Elliott and Gragg in which he denied his guilt. When counsel attempted to play the tape during cross-examination of Gragg, the trial court ruled it inadmissible, but ruled that counsel could offer the tape during its case-in-chief. Counsel elected not to play the tape. Elliott contends this tactical trial decision constituted ineffective assistance of counsel. The Virginia Supreme Court disagreed, holding that because counsel obtained Gragg's admissions to facts

that it planned to establish with the tape, the decision not to play the tape was reasonable. 652 S.E.2d at 477-78. Moreover, the tape contained statements that would have been harmful to the defense, such as Elliott repeating that he was at the townhouse at the time of the murders. Accordingly, this claim fails the *Strickland* test.

11. *Portraying Gragg as the Actual Murderer.*

Elliott next asserts that counsel erred by suggesting in its opening statement that Gragg might have committed the murders, which allowed the prosecution to counter at trial that Gragg was nowhere near the scene. This misstates the opening statement, which rhetorically asked "Who was the person that benefitted from this?" At most, this statement implied that Gragg had a motive and may have manipulated Elliott into murdering Finch. It does not imply that she committed the murders herself. This Court joins the Virginia Supreme Court in rejecting this claim. *Elliott v. Warden,* 652 S.E.2d at 478.

12. *Failure to Adequately Address the Blood on the Back Gate.*

Elliott contends ineffective assistance because counsel did not adequately address or refute the presence of Elliott's blood on the inside of the back gate at the townhome where the murders occurred. There is little doubt as to the significance of this piece of physical evidence – it placed Elliott, bleeding, at

the scene of the murders. It is unclear how counsel could have countered such damning evidence. It is beyond dispute that Elliott's blood was found on the inside of a padlocked gate in the backyard, and there was no evidence adduced at trial explaining how his blood was left there another time. The chain of custody was established beyond dispute at trial, Officer Leo collected the blood and delivered it to the Virginia Department of Forensic Science. It is not ineffective assistance to refrain from raising theories for which there is no supporting evidence, or refrain from making objections that have no merit.

13. *Failure to Object to Inadmissible. Prejudicial Evidence of Uncharged Crimes and of Collateral Events.*

Elliott asserts that counsel failed to object to evidence of his alleged "theft" of money from his wife's account; his alleged "rape" of Gragg when she was sedated prior to surgery; the alleged illegal attempt to obtain a silencer, a felony under the Virginia Code; and his alleged attempt to flee and evade the police. He cites Virginia cases holding that collateral facts prejudicial to the defendant are not admissible. *See, e.g., Seilheimer v. Melville,* 224 Va. 323, 295 S.E.2d 896 (Va.1982). But these facts were not collateral. As the Virginia Supreme Court determined, such evidence was relevant to Elliott's motive by showing that he would consider killing Gragg's exhusband Finch in a twisted attempt to curry favor with her, as well as acts he took in furtherance of his plan to kill Finch.

Gragg testified about the theft of money from Elliott's wife, which showed the intertwined nature of her relationship with Elliott and further established background relating to his motive. *Elliott v. Warden,* 652 S.E.2d at 478-479. Evidence of Elliott's attempt to obtain a silencer clearly was relevant to his plan to use a firearm to commit murder and escape detection. Finally, Elliott misstates Hoffman's testimony about Elliott's supposed attempt to flee; the entirety of Hoffman's testimony was that Elliott drove fast, leading Hoffman to fear that he was trying to flee, but then Elliott told him he was going to turn himself in.

In short, these claims do not meet the "performance" or "prejudice" prongs of the *Strickland* test.

14. *Failure to Effectively Move for a Dismissal.*

Counsel moved to strike the prosecution's case when it rested, but offered no basis for the motion other than to "preserve the record." Elliott argues that grounds for mistrial existed and therefore counsel was ineffective in failing to move for dismissal on these grounds. This Court concurs with, and adopts the reasoning of, the Virginia Supreme Court:

> The record, including the trial transcript and the exhibits, demonstrates that the evidence was sufficient to overcome a motion to strike and to support petitioner's convictions . . . Petitioner fails to allege how a more specific

> motion to strike would have affected his case and fails to allege any viable basis upon which counsel should have sought a mistrial. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

652 S.E.2d at 480-81.

15. *Failure to Put on a Defense.*

Elliott's claims for failure to put on a defense largely rehash and restate his other claims for habeas relief, such as counsel's failure to play the audio tape and failure to use character testimony. As the Virginia Supreme Court noted, Elliott fails to identify any additional witnesses whose testimony would have had a reasonable probability of changing the outcome at trial. Cumulative and boilerplate objections to trial strategy do not establish ineffective assistance of counsel under *Strickland*. *See also Lenz*, 593 S.E.2d at 305 ("Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel.").

16. *Failure to Object to the Prosecution's Improper Closing Arguments.*

Elliott further asserts cumulative habeas claims when he argues that his counsel failed to object to the prosecution's closing argument, which allegedly maligned Elliott's character and emphasized "uncharged" crimes such as theft, attempting to acquire a silencer, and fleeing from the police. The Court has addressed these specific arguments above, and will add only that the trial transcript reveals no improprieties in the prosecution's closing argument. The prosecution was entitled to argue the truthfulness of prosecution witnesses, corroborating testimony, and evidence adduced at trial. The Court agrees with the Virginia Supreme Court that these claims fail under *Strickland. Elliott v. Warden,* 652 S.E.2d at 481.

17. *Cumulative Prejudice.*

Elliott claims he was prejudiced by the cumulative effect of counsel's alleged failings. "Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Elliott v. Warden,* 652 S.E.2d at 481 (quoting *Lenz v. Warden,* 267 Va. 318, 593 S.E.2d 292, 305 (Va.2004)); *see also Mueller v. Angelone,* 181 F.3d 557, 586 n. 22 (4th Cir.1999); *Fisher v. Angelone,* 163 F.3d 835, 852-53 (4th Cir.1998) ("Having just determined that none of counsel's actions could be considered constitutional error . . . it would be odd, to say the least, to conclude

that those same actions, when considered collectively, deprived Fisher of a fair trial").

B. Counsel Rendered Ineffective Assistance at the Penalty Phase.

Elliott asserts additional grounds for ineffective assistance at the penalty phase of trial. The Court will evaluate these claims in sequence.

1. *Failure to adequately develop and present mitigation evidence.*

Elliott claims that counsel did not interview or call 27 mitigation witnesses, including coworkers and childhood friends, who could have testified about his positive attributes and perhaps convinced the jury to spare his life. "Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." *Tucker v. Ozmint,* 350 F.3d 433, 442 (4th Cir.2003). Counsel presented similar mitigation evidence through six other witnesses, including Elliott's wife and six of his friends and coworkers, who testified about Elliott's kindness and decency, and his service to his country. The Virginia Supreme Court held that testimony from the other mitigation witnesses would have been cumulative and would not have made a difference to the sentence. *Elliott v. Warden,* 652 S.E.2d at 483-484. This Court agrees. Elliott offers no reason to

believe that additional mitigation witnesses would have dissuaded the jury from imposing the death penalty, and he cannot demonstrate ineffectiveness merely by proffering additional, duplicative testimony. *Hedrick v. True,* 443 F.3d 342, 353 (4th Cir.2006), *cert. denied,* 127 S.Ct. 10 (2006).

2. *Failure to renew penalty phase motions raised in Trial 1.*

Elliott next claims that counsel was ineffective for failing to renew motions made in the first trial. These motions sought to declare Virginia's death penalty statutes unconstitutional, to instruct the jury to be unanimous on vileness and to exclude victim impact evidence. Each of these motions was denied for good reason, as they were contrary to Virginia Supreme Court authority. *Winston v. Commonwealth,* 268 Va. 564, 604 S.E.2d 21, 29 (Va.2004) (holding that the Virginia death penalty statutes, and use of the term "vileness" as an aggravating factor, is constitutional); *Hoke v. Commonwealth,* 237 Va. 303, 377 S.E.2d 595, 602 (Va.1989) (specific instruction on unanimity for vileness is not required), *cert. denied,* 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989); *Beck v. Commonwealth,* 253 Va. 373, 484 S.E.2d 898, 906 (Va.1997) (holding that victim impact evidence is admissible), *cert. denied,* 522 U.S. 1018, 118 S.Ct. 608, 139 L.Ed.2d 495 (1997). Plainly, counsel was reasonable in not renewing motions unsupported in law, and which were unsuccessful in the first trial.

3. *Failure to object to improper and prejudicial victim impact testimony.*

Elliott argues that the victim impact testimony put on by the prosecution violated his Due Process Clause rights. Specifically, Elliott points to the testimony of Dana Thrall's mother about Dana Thrall's last minutes of life, and testimony of Dana Thrall's brother and sister-in-law about the impact of the events on Dana's two boys, ages 4 and 6, which allegedly included hearsay testimony about their fear of the man who killed their mother and their psychological problems resulting from this tragedy.

Victim impact testimony is allowed under Virginia Code § 19.2-264.4. Such testimony is permitted during the sentencing proceeding so long as it is "necessary and relevant," *see Thomas v. Commonwealth,* 263 Va. 216, 559 S.E.2d 652 (Va.2002), and more probative than prejudicial, *see Beck v. Commonwealth,* 253 Va. 373, 484 S.E.2d 898, 906 (Va.1997). Under this statute, Ms. Thrall's mother was entitled to testify about her daughter's last minutes of life, and counsel made no error in failing to object during her testimony. The statements about Ms. Thrall's children were not hearsay because they were not offered for truth, *i.e.,* that the children actually feared for their lives or suffered psychologically. Rather, these statements were offered to show the severe psychological impact of the murders on the kids. *Elliott v. Warden,* 652 S.E.2d at 482. This determination of state law by the Virginia Supreme Court will not be disturbed by this Court. Accordingly, the Court

finds no ineffective assistance based on counsel's failure to object to victim impact testimony.

4. *Failure to object to prosecution's improper closing arguments.*

Elliott makes three sets of arguments that his counsel unreasonably failed to object to the prosecution's closing argument. First, he urges that his counsel unreasonably failed to object when the prosecution told the jury that the victims' families would "get some solace" from a death sentence, despite the parents of the victims allegedly opposing a death sentence. Next, Elliott criticizes his counsel for failing to object to the prosecution's "eleven separate statements" in its closing that Elliott would be a future danger. Third, Elliott asserts that his counsel should have objected to the prosecution's statement that Elliott had sex with Gragg while she was sedated and unconscious.

As to the first argument, the Virginia Supreme Court correctly held that the prosecution's statement that members of the victims' families would get solace from a death sentence was fairly supported by the evidentiary record. 652 S.E.2d at 482. As to the second argument, Elliott claims that the prosecution made eleven statements on his future dangerousness, but fails to specifically identify any of those eleven statements. This is insufficient to support a habeas claim. Moreover, the Virginia Supreme Court dismissed this claim because counsel was not

unreasonable in accepting the trial court ruling allowing general argument that a death sentence would prevent future harm. In short, counsel made reasonable objections at reasonable times, and having failed to prevail on those objections, there was nothing further to do. *Id.* at 482-483. As to Elliott's argument regarding sexual involvement with Gragg while she was sedated, the statement in closing was based on evidence of "circumstances surrounding the offense." *See* VA Code § 19.2-264.4(B). This Court agrees with the Virginia Supreme Court that such evidence was relevant to Elliott's fatal attraction to Gragg and thus to his motive to kill Finch. *Elliott v. Warden,* 652 S.E.2d at 483. Elliott's habeas claims based upon statements during closing argument are hereby denied.

5. *Failure to seek continuance or other relief based on the pre-sentence report.*

Elliott claims that he received a copy of the pre-sentence report only one day prior to sentencing, and asks the Court to infer that his counsel did not review that report. He asserts that counsel should have asked for a continuance of the hearing based on Clayton's Finch's statement in the report that Detective Hoffman "sabotaged" the defense. The Virginia Supreme Court properly held that this claim was baseless speculation, that there was nothing in the report or elsewhere to substantiate this speculation, and dismissed this claim. *Id.* at 484. Nor is there any basis for a belief that asking for a continuance of the

sentencing proceedings would have altered the outcome. This Court dismisses this claim under both prongs of *Strickland*.

6. *Cumulative effect of counsel's ineffective assistance in the penalty phase prejudiced Elliott.*

Elliott again argues that he was prejudiced by the cumulative effect of counsel's alleged failings during the penalty phase. Again, "[h]aving rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Elliott v. Warden*, 652 S.E.2d at 481 (quoting *Lenz*, 593 S.E.2d at 305); *see also Mueller*, 181 F.3d at 586 n. 22; *Fisher*, 163 F.3d at 852-53.

C. Claims of Ineffective Assistance Relating to the Jury Instructions/Verdict Forms.

Elliott makes a volley of habeas claims based on his counsel's alleged ineffectiveness for failure to request certain jury instructions and failure to object to others. Applying *Strickland*, the Virginia Supreme Court found each of these claims deficient. 652 S.E.2d at 484-487. This Court agrees with the Virginia Supreme Court's conclusions, and shall address each of these claims below.

1. *The failure to request the "mere presence" instruction at guilt phase.*

Elliott claims that counsel unreasonably failed to ask for a "mere presence" instruction, which allegedly denied him due process of law by permitting him to be found guilty even if he was only present at the scene of the crimes. In reality, counsel asked for the instruction but the trial court required that it be coupled with the "principal in the second degree" instruction. Since Elliott's involvement as a principal in the second degree did not fit the defense theory of the case – that Elliott had no criminal involvement in the killings at all – counsel withdrew his request for a "mere presence" instruction. The Virginia Supreme Court held that this tactical decision was reasonable given that Elliott's theory was that he committed no criminal act. *Elliott v. Warden,* 652 S.E.2d at 484. This Court holds that these claims do not meet *Strickland's* "performance" or "prejudice" prongs. Counsel cannot be faulted for refusing instructions contrary to his theory of the case.

2. *The absence of the "triggerman" instruction at guilt phase.*

The same reasoning applies to Elliott's next habeas claim, which argues ineffective assistance because counsel failed to seek the "triggerman" instruction. The "triggerman" rule provides that a person who assists, but does not actually commit, a murder cannot be liable for capital murder; "only the actual perpetrator of the crime may be convicted of capital

murder." *See* Va.Code § 18.2-18; *Johnson v. Commonwealth,* 220 Va. 146, 255 S.E.2d 525 (Va.1979). The practical effect of this rule is that a triggerman can be liable only as a principal in the second degree. Thus, a triggerman instruction would have conflicted with the defense theory of the case that Elliott was not involved in the murders at all. Nor does a triggerman instruction fit the evidence adduced at trial. It was reasonable for counsel to elect not to seek this instruction, and the Court rejects this claim under *Strickland.* 652 S.E.2d at 484.

3. *Failure to object to the capital murder instruction and its verdict form at guilt phase.*

Elliott claims that Jury Instruction No. 4, and verdict form APP 307, erroneously instructed the jury that if it did not find beyond a reasonable doubt that the Capital Murder was "part of the same transaction" as the other murder, then it must find Elliott guilty of First Degree Murder. Through a strained interpretation of the Virginia Code, Elliott argues that the proper instruction should have directed the jury to find Second Degree Murder if it did not find Capital Murder. This misapprehends Virginia law. Under the Virginia Code, premeditated murder – whether capital or not – is first degree murder. *See* Va.Code § 18.2-32. The Virginia Supreme Court has upheld a jury instruction on capital murder similar to Jury Instruction No. 4 used in this trial. *See Elliott v. Warden,* 652 S.E.2d at 484 (citing *Mackall v.*

Commonwealth, 236 Va. 240, 372 S.E.2d 759, 768 (Va.1988), *cert. denied,* 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1988)). Moreover, Elliott cannot show prejudice because the jury found him guilty of the capital murder of Dana Thrall and therefore an instruction giving the jury the option of finding second degree murder was immaterial. In short, these claims satisfy neither the performance nor the prejudice prongs of *Strickland.*

4. *Failure to object to the verdict form for the Finch murder at guilt phase.*

Elliott also objects to verdict form APP 309, used for the Finch murder, because it told the jury to find him guilty or not guilty "as charged in the indictment." Elliott relies on a synthetic contradiction between the verdict form and Jury Instruction No. 5, which required the jury to find three elements to convict of First Degree Murder. As the Virginia Supreme Court held, the jury instructions and verdict forms were clear and straightforward and conformed to the law. *Elliott v. Warden,* 652 S.E.2d at 484-485. Counsel need not make spurious objections. This claim fails under *Strickland* as well.

5. *Failure to request a victim impact testimony instruction at penalty phase.*

Elliott next claims ineffective assistance because counsel failed to request a jury instruction at the second trial on how to evaluate victim impact testimony,

after counsel had obtained such an instruction in the first trial. But Elliott offers no authority holding that a victim impact instruction at the penalty phase is mandatory. The jury was properly instructed on the need to find vileness as an aggravating factor before imposing a sentence of death, and there is no evidence that the jury disregarded this instruction. *Elliott v. Warden,* 652 S.E.2d at 485. As such, this habeas claim has no merit.

6. *Errors in capital murder verdict form at penalty phase.*

Elliott objects to the capital murder verdict form because it referred to "Capital Murder," "the offense," and "torture" and "depravity of mind" without defining those terms. He argues that counsel violated *Strickland* by not objecting to this verdict form. This ignores the fact that the jury instructions provided definitions of these terms, and that the verdict form represented an accurate statement of the statutory law. Nor were these terms likely to confuse the jury. Elliott points to no evidence that the jury was, in fact, confused. Unsubstantiated assertions of jury confusion do not amount to a claim for ineffective assistance under *Strickland*.

7. *Failure to provide proper verdict form for the "life in prison" sentence at penalty phase.*

Elliott misreads the "life in prison" sentence verdict form, which, he argues, told the jurors that they must unanimously find that the prosecution failed to prove the aggravating factor before they could give Elliott life in prison. In Virginia, juries must decide criminal cases and sentencing by unanimous verdict. Rule 3A:17(a), *Rules of Supreme Court of Virginia; Evans v. Commonwealth,* 228 Va. 468, 323 S.E.2d 114, 121 (Va.1984), *cert. denied,* 474 U.S. 1025 (1985). Thus, the verdict form conformed to Virginia law, and counsel made no error in failing to object to it. *See Elliott v. Warden,* 652 S.E.2d at 485-486.

8. *Multiple assignments of errors and claims regarding Instruction No. 1 and the capital verdict form at penalty phase.*

Elliott argues that the Virginia Supreme Court, on direct appeal, erred by refusing to review errors he assigned to the trial court's rulings in the first trial. *See Elliott v. Commonwealth,* 593 S.E.2d at 290. The Virginia Supreme Court was not required, after the second trial, to review errors assigned during the first trial. Nor did counsel's choice not to renew these motions at the second trial constitute ineffective assistance under *Strickland.* Simply put, counsel need not assign error for every conceivable issue on appeal. Rather, attorneys have the discretion to advance the issues most likely to prevail. *See Jones v.*

Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Elliott next argues that the trial court did not use standard jury instructions and verdict forms, and that the Virginia Supreme Court mistakenly concluded that the instructions and forms were standard. The language on the forms – "depravity of mind" and "torture" – came directly from the Virginia statute at issue. *See* Va.Code § 19.2-264.4(D)(1). The trial court certainly was not required to omit language from the statute defining "vileness" on the instructions and forms pertaining to the vileness aggravating factor.

Elliott further contends that because there was no evidence of depravity or torture, the trial court should have omitted those terms from the jury submissions. This is wrong for two reasons. First, as a matter of law, jury instructions and verdict forms that track the language of the statute are accurate statements of the law, and it is not improper to submit accurate statements of the law to the jury. *See Elliott v. Warden,* 652 S.E.2d at 486; *Tuggle,* 323 S.E.2d at 553. Second, as a matter of fact, there was evidence in this case to support a finding of torture. After murdering Ms. Thrall's boyfriend, Elliott then pistol-whipped her, shot her execution-style, and left her to die with her young children upstairs in the house. The jury reasonably could have concluded that such evidence supported "depravity of mind."

Nor was counsel required to ask for an instruction defining "depravity of mind," a phrase which does not require further definition under Virginia law, *see Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539, 553 (Va.1984), *rev'd on other grounds*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985), or "aggravated battery," which was defined elsewhere in the instructions as force "beyond the minimum necessary to accomplish the act of murder."

Lastly, Elliott asserts that counsel failed to ask for an instruction that the jury's finding on the "vileness" factor be unanimous, but the jury was elsewhere instructed that it must reach unanimous verdict. *Elliott v. Warden*, 652 S.E.2d at 485-486.

9. *Failure to request instructions that the "defendant is presumed innocent of the aggravating factors." that "he does not have to testify in the penalty phase." and on the definition of "reasonable doubt."*

Elliott next contends that the jury should have been instructed at the penalty phase that "defendant is presumed innocent of the aggravating factors," that "he does not have to testify in the penalty phase," and on the meaning of "reasonable doubt." Elliott admits that the jury was instructed on the presumption of innocence, the Fifth Amendment right not to testify, and the meaning of "reasonable doubt" during the guilt phase of trial. There is no evidence of unresolved jury confusion carrying over into, or arising during, the penalty phase.

Moreover, an instruction that the defendant is "presumed innocent" would have been misleading and confusing at the penalty phase. Elliott already had been adjudged guilty of the crimes, and once the Commonwealth proved the existence of an aggravating factor, the burden shifted to Elliott to prove mitigating factors. Accordingly, this Court must reject these claims. *Elliott v. Warden,* 652 S.E.2d at 484, 487.

D. Counsel Rendered Ineffective Assistance On Direct Appeal.

Criminal defendants have a due process right to the effective assistance of counsel on appeal. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The standard for ineffective assistance is the same for trial and appellate counsel, and counsel's actions are measured against the *Strickland* standard. 466 U.S. at 688; *Smith v. Murray,* 477 U.S. 527, 535-536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). Counsel are not required to raise every possible issue on appeal; they are given considerable discretion in making tactical decisions. *Jones,* 463 U.S. at 751-752. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Strickland,* 466 U.S. at 688. Furthermore, under the prejudice prong, a petitioner must show a reasonable probability that, but for appellate counsel's poor performance, he would have obtained a reversal or new trial. *Smith v. Robbins,* 528 U.S. 259, 285-286, 120 S.Ct. 746, 145

L.Ed.2d 756 (2000) ("[appellant] must show a reasonable probability that . . . he would have prevailed on his appeal").

Elliott advances an array of claims relating to the alleged ineffectiveness of his counsel on direct appeal:

1. *Failure to assign error to the penalty phase of trial.*

Elliott rehashes his prior argument that the prosecution impermissibly argued future dangerousness during the penalty phase. As explained above, the trial court allowed a general argument that a death sentence was the appropriate punishment, in part because it would prevent future harm, and this ruling was affirmed by the Virginia Supreme Court. On state habeas appeal, the Virginia Supreme Court found that the jury was instructed that it could impose the death penalty only if it found the vileness factor proven beyond a reasonable doubt. *Elliott v. Warden*, 652 S.E.2d at 488. The instructions therefore clearly informed the jury that a death sentence had to be based on vileness, not future dangerousness. The jury is presumed to have followed the instructions and Elliott proffers nothing leading the Court to believe otherwise. The Court dismisses this claim.

2. *Failure to argue assignments of error.*

The next contention is that counsel was ineffective for failing to argue five particular assignments of error. On state habeas appeal, the Virginia

Supreme Court held, these assignments of error were without merit. *Id.* at 488. Counsel is not ineffective for failing to pursue arguments lacking merit. Furthermore, three of these assignments of error were not preserved at trial and thus would have been barred by Rule 5:25, *Rules of the Supreme Court of Virginia,* 652 S.E.2d at 488. Clearly, it is not deficient representation to focus an appeal on issues that were preserved at trial, and forego issues that were not.

3. *Failure to cite authority requiring the adoption of a narrowing instruction regarding the three vileness factors.*

Next, Elliott recycles his habeas challenges to the jury instructions by arguing that counsel failed to convince the court to include a limiting instruction that specified how the three "vileness" factors are applied. As explained above, *supra* at 35-36, the jury instructions on vileness were proper. "Depravity of mind, aggravated battery, and torture are not discrete elements of vileness that would require separate proof but rather are 'several possible sets of underlying facts [that] make up [the] particular element'" of vileness. *Richardson v. United States,* 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). This claim is dismissed.

4. *Failure to argue that the jury's verdict was not the product of a reasoned and dispassionate deliberation.*

Under Virginia Code § 17.1-313(C)(1), the Virginia Supreme Court must determine whether the jury imposed the death sentence "under the influence of passion, prejudice, or any other arbitrary factor." Elliott argues that his appellate counsel failed to argue on direct appeal that the jury's sentence violated this provision. However, on state habeas review the Virginia Supreme Court found that its prior review on direct appeal comported with Section 17.1-313(C)(1). *Elliott v. Warden,* 652 S.E.2d at 489. Elliott fails to articulate how counsel could have changed the Virginia Supreme Court's mind on direct appeal, and he offers no specific arguments that might have changed the outcome. As such, this claim fails under *Strickland.*

E. Cumulative Effect of all Preceding Ineffective Assistance of Counsel Claims.

As before, Elliott argues that the "cumulative effect" of the preceding ineffective assistance claims demonstrates that habeas relief is warranted. Again, "[h]aving rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Elliott v. Warden,* 652 S.E.2d at 489 (quoting *Lenz,* 593 S.E.2d at 305).

F. The Handwritten Note Found In Appellate Record.

Elliott contends that the trial court failed to inform him about a handwritten note, which he postulates was a jury question never brought to the attention of counsel. This note appeared in the manuscript record that was forwarded to the Virginia Supreme Court by the trial court Clerk. It stated: "Can you supply a more simplistic definition of reasonable doubt from a guilt or innocence point of view?" There is little reason to believe that this note was a jury question. The trial transcript does not suggest that any such note was submitted to the jury. The jury submitted questions on two occasions during the trial, and each time the court's procedure was to read the question to counsel and seek input from the attorneys on what action should be taken. This procedure was not initiated for a question on reasonable doubt.

On direct appeal, the Virginia Supreme Court concluded that this claim was pure speculation and that there was no evidence suggesting that the note was a jury question. *Elliott v. Commonwealth,* 593 S.E.2d at 282. On state habeas appeal, the Virginia Supreme Court found that the claim "was not cognizable in a habeas corpus proceeding" because Elliott's request for a hearing was not a jurisdictional defect remediable in a habeas proceeding. *Elliott v. Warden,* 652 S.E.2d at 487. This Court agrees with these prior holdings and adds that, under Virginia law, it is not reversible error to refrain from giving a

jury instruction that defines "reasonable doubt." *See Strawderman v. Commonwealth,* 200 Va. 855, 108 S.E.2d 376, 379 (Va.1959) ("It should be remembered . . . that on numerous occasions we have stated that instructions attempting to define reasonable doubt should be discouraged as it is highly probable that any definition devised would be less illuminating than the expression itself."). Thus, the trial court would have been under no obligation to supply a definition of reasonable doubt, even had the jury asked for one.

G. Post-trial Destruction and/or Release of Human Biological Evidence Violated Elliott's Due Process Rights.

Elliott argues that his due process rights were violated by the Commonwealth when the Prince William County Police Department allegedly destroyed two sets of stains/swabs that the police took from the crime scene, and allegedly released components of Elliott's pickup truck, on which it had found biological evidence, to an insurance company. Relying on *Arizona v. Youngblood,* Elliott argues that the government's bad faith destruction of "potentially useful evidence" denied him due process. 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). According to Elliott, bad faith was present because the police supposedly admitted at the November 2006 hearing before the Circuit Court that they deliberately destroyed and released the evidence – in violation of two Virginia statutes. *See* Va.Code § 19.2-270.4

(authorizing destruction of trial evidence "after exhaustion of all appellate remedies"); § 19.2-270.4:1 (prohibiting destruction of "human biological evidence" in a death penalty case until after "the judgement is executed").

The Commonwealth argues that: federal habeas review of a claim for disposed-of biological evidence is barred by a Virginia statute; the claim is precluded by the state habeas statute of limitations; there was no bad faith by the police here and cases finding bad faith each considered *pre-trial,* not post-trial, destruction of evidence; and no physical evidence introduced at trial was destroyed or disposed of, nor was the critical physical evidence linking Elliott to the murder scene.

As a threshold matter, Virginia Code § 19.2-270.4:1, "Storage, preservation and retention of human biological evidence in felony cases," expressly provides in subsection (E) as follows:

> An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding.

Thus, this statutory provision plainly bars the habeas relief sought by Elliott. *See Lovitt v. Warden,* 266 Va. 216, 585 S.E.2d 801, 816 (Va.2003) ("in stating the procedural requirements relating to the retention of human biological evidence in Code § 19.2-270.4:1, the

General Assembly also recognized that noncompliance with those procedures may occur and provided statutory language plainly excluding any such noncompliance as a basis for appellate or habeas corpus relief").

Moreover, this claim is barred from federal habeas review under *Gray v. Netherland,* 518 U.S. 152, 162, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). Elliott was required to present due process violations to the state court in a timely manner. This claim was not timely presented to the state court on direct appeal or during state habeas proceedings; indeed, the Virginia Supreme Court denied Elliott's motion "for leave to amend his habeas corpus petition with a *recently discovered* due process claim and to conduct discovery." *Elliott v. Warden,* 652 S.E.2d at 489 (emphasis added). As such, *Gray* precludes federal review. 518 U.S. at 162.

Finally, the physical evidence relating to the back fence gate – from which Elliott's DNA was collected, which established his presence at the murder scene – was not destroyed. Further, courts have not applied the bad-faith standard for constitutional due process violations to *post*-trial destruction of evidence by police departments. *See Lovitt v. True,* 403 F.3d 171, 187 (4th Cir.2005).

For the reasons given above, the Court must dismiss this habeas claim.

H. Exclusion of Polygraph Evidence Violated Elliott's Right to Confront Witnesses.

Elliott makes a Confrontation Clause argument based upon the trial court's exclusion of evidence from two polygraphs administered to Gragg, which he contends would have rebutted a false impression that Gragg had been truthful with the police. At trial, Elliott argued that the prosecution had "opened the door" to cross-examination of Gragg about the polygraphs when Detective Hoffman referred to a "polygrapher" during his direct testimony. On direct appeal, the Virginia Supreme Court disagreed, reasoning that the doctrine of "curative admissibility" did not compel the trial court to allow "inadmissible and unreliable" polygraph evidence, and that the court correctly gave a curative instruction. *Elliott v. Commonwealth,* 593 S.E.2d at 283-284.

In Virginia, as well as in the Fourth Circuit, evidence that a witness has taken a polygraph test is inadmissible. *Robinson v. Commonwealth,* 231 Va. 142, 341 S.E.2d 159, 167 (1986) (holding that results of a polygraph examination may not be used to impeach a witness); *U.S. v. A & S Council Oil Co.,* 947 F.2d 1128, 1133 (4th Cir.1991). In light of this rule, this Court agrees with the Virginia Supreme Court that the trial court made a reasonable decision to exclude evidence of Gragg's polygraph tests. Refusing to allow cross-examination on inadmissible polygraph evidence did not violate the Confrontation Clause. *See A & S Council Oil Co.,* 947 F.2d at 1133

(explaining that Fourth Circuit law "precludes direct attacks on or bolstering of the credibility of a witness through evidence that the witness has taken a polygraph test").

I. Claims Found Procedurally Defaulted By the Virginia Supreme Court.

The Virginia Supreme Court found that Elliott's *Brady* claims and *Napue/Giglio* claims were procedurally defaulted. Under *Gray v. Netherland,* 518 U.S. 152, 162, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), and *Fisher v. Angelone,* 163 F.3d 835, 851-52 (4th Cir.1998), *cert. denied,* 526 U.S. 1035, 119 S.Ct. 1290, 143 L.Ed.2d 382 (1999), "a federal habeas court may not review a claim when a state court has declined to consider the claim's merits on the basis of an adequate and independent state procedural rule." *Fisher,* 163 F.3d at 844. A rule is adequate "if it is regularly and consistently applied by the state court," and is independent "if it does not depend on a federal constitutional ruling." *See Yeats v. Angelone,* 166 F.3d 255, 261-62 (4th Cir.1999) (internal citations and quotations omitted). When a state court has declined review under a state procedural rule, "concerns of comity and federalism counsel in favor of a federal habeas court declining to reach the merits of the federal claim." *Id.* at 261. Thus, the federal court should dismiss the defaulted habeas claim unless the petitioner shows either cause for the default and prejudice arising from the default, or a fundamental miscarriage of justice. *Fisher,* 163 F.3d at 844.

Here, the Virginia Supreme Court held that the *Brady* claims "are procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus." *Elliott v. Warden,* 652 S.E.2d at 473 (citing *Slayton v. Parrigan,* 215 Va. 27, 205 S.E.2d 680, 682 (Va.1974)). In *Slayton,* the Virginia Supreme Court held that "when a prisoner has been afforded a fair and full opportunity to raise and have adjudicated the question . . . in his trial and upon appeal," and has failed to do so, the "prisoner is not entitled to use habeas corpus to circumvent the trial and appellate process for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." 205 S.E.2d at 682. The *Slaylon* rule has been upheld by the Supreme Court and the Fourth Circuit as an "independent" and "adequate" state procedural rule. *See Smith v. Murray,* 477 U.S. 527, 533, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Reid v. True,* 349 F.3d 788, 804 (4th Cir.2003), *cert. denied,* 540 U.S. 1097, 124 S.Ct. 979, 157 L.Ed.2d 810 (2003); *Wright v. Angelone,* 151 F.3d 151, 159-60 (4th Cir.1998), *cert. denied,* 525 U.S. 946 (1998).

In accord with these authorities, this Court holds that each of Elliott's *Brady* and *Napue/Giglio* claims are procedurally defaulted and barred from federal habeas review. The Court now turns to whether Elliott can establish an exception by showing cause for default and resulting prejudice, or a fundamental miscarriage of justice, that would warrant federal

habeas review. Cause for default exists only when the "prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986); *see also Coleman v. Thompson,* 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). As shown below, there is no cause and prejudice for any of Elliott's *Brady* claims.

a. Claims Under *Brady v. Maryland.*

1. *Failure to produce statements of the Thrall boys.*

Elliott alleges that the Commonwealth did not disclose exculpatory statements allegedly made by the Thrall boys. He relies on several affidavits containing hearsay statements that one of the Thrall boys' claimed to see "either a black man or a man wearing black running from the rear of the townhouse." *Elliott v. Warden,* 652 S.E.2d at 471. These affidavits came from a neighbor, from Elliott's habeas investigator, and from the Thrall boys' grandfather. None of these affidavits contains admissible evidence, much less establishes that the police or prosecution had any knowledge of the alleged exculpatory statements. *Id.* Thus, there is no cause for default or prejudice, and this claim fails.

2. *Failure to produce photographs provided by victim Robert Finch's parents.*

Elliott alleges that the prosecution failed to produce photographs of Robert Finch taken after he

was severely beaten by Gragg's friends and family members. Elliott claims that these photographs were exculpatory because they tended to support his theory that other people had a motive for killing Finch. During trial, Elliott's counsel claimed to have information that the photographs existed, the prosecution denied it, and counsel made no objection or motion based on non-disclosure of exculpatory evidence. If counsel believed these photographs existed, he could have moved for disclosure during trial. He did not. Elliott now offers no cause for his default on this issue during state proceedings, beyond a bald assertion that the Commonwealth was "feigning ignorance of evidence." This Court will not impute a severe ethical breach to the prosecution based on such speculation.

Moreover, it is unlikely the alleged photographs would have been admissible. On direct appeal, the Virginia Supreme Court held that evidence of a prior assault on Finch by Gragg's associates was "too tenuous and speculative" to be relevant, and therefore was properly excluded at trial. *Elliott v. Commonwealth,* 593 S.E.2d at 288. Thus, the alleged photographs would have been excluded, and therefore Elliott cannot establish prejudice.

3. *Failure to produce alleged tape recording of the "smoke break conversation" and written statements regarding that conversation.*

Next Elliott postulates that the police recorded a conversation between Gragg and investigators during a smoke break from her interview, and composed written reports memorializing the substance of these conversations. He claims the Commonwealth failed to produce this evidence of the "smoke break conversation." At trial the prosecution represented that it had produced "every statement that [Gragg] made to any of [our] agents." When questioned directly by the trial court, the prosecution denied the existence of a recording or written statement of the smoke break conversation. The Virginia Supreme Court held this claim defaulted, both on direct review and state habeas review. 593 S.E.2d at 288, 652 S.E.2d at 472.

The existence of recordings or written statements of the smoke break conversation is pure conjecture. Elliott has no evidence of their existence. The prosecution team and three police detectives all denied the existence of such materials, the trial court saw no cause for further investigation, and the Virginia Supreme Court twice denied relief on this claim. Furthermore, to show cause for default and prejudice Elliott would need evidence that the transcription of the smoke break conversation contained exculpatory material. He has no such evidence. In fact, the trial record shows quite the opposite – at trial, Gragg testified that during the smoke break she told

Detective Hoffman about phone calls with Elliott during which he made incriminating statements. Thus, the Court finds no cause for default and no prejudice.

4. *Failure to produce third polygraph report.*

In his next *Brady* claim, Elliott asserts that the police gave Gragg a third polygraph on May 14, 2001, and then failed to produce the report from this polygraph despite a court order to produce all polygraph reports. He relies on a discrepancy in the dating of the second polygraph, which bears a handwritten date "5-10-2001" near the examiner's signature for "time of testing," but the typed report reads "Date: 5/14/01" (the following Monday). The most logical inference is that these dates both refer to the same polygraph, which was administered on May 10 with a report prepared on May 14. Four witnesses (Ebert, Willett, Detective Hoffman, Marlett) confirmed that Gragg was administered only two polygraphs. The Virginia Supreme Court concluded that the record shows only two polygraph tests administered to Gragg, one on January 12, 2001, and another on May 10, 2001. *Elliott v. Warden,* 652 S.E.2d at 472. Accordingly, the Court found his claim "factually without merit." *Id.* This Court affirms that finding, as Elliott has not proven by "clear and convincing" evidence that this factual determination by the state court was erroneous. *See* 28 U.S.C. § 2254(e)(1). Nor can Elliott show prejudice. There is no evidence that any third

polygraph would have contained exculpatory material.

5. *Failure to comply with constitutional duties.*

Elliott asserts a *Brady* violation for the alleged failure of the Commonwealth to investigate potential leads suggesting that another perpetrator committed the crimes. He relies on a hearsay statement by William Thrall and his own investigator's critique of the police investigation. The Virginia Supreme Court found this claim procedurally defaulted. *Elliott v. Warden*, 652 S.E.2d at 472. Elliott offers no cause for the default. Moreover, police are allowed to cease investigation once they believe that they have apprehended the murderer. An *ex post facto* assertion that a police investigation was incomplete – without evidence of bad faith by the police – does not create a due process violation. *See Holdren v. Legursky*, 16 F.3d 57, 60 (4th Cir.1994) (failure to test evidence at the scene or conduct an investigation in a particular way does not state a due process violation), *cert. denied*, 513 U.S. 831, 115 S.Ct. 106, 130 L.Ed.2d 53 (1994).

Nor does this claim constitute a *Brady* violation. *Brady* obligates the government to disclose exculpatory information in its possession; it applies only "when evidence is 'known to the prosecution but unknown to the defense.'" *Lovitt v. True*, 403 F.3d 171, 185 (4th Cir.2005) (quoting *United States v. Agurs*,

427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

6. *Cumulative materiality.*

Finally, Elliott argues the alleged *Brady* violations, aggregated together, show materiality. The Virginia Supreme Court found this claim procedurally defaulted as well, 652 S.E.2d at 472-473, and this Court agrees. Having found each of the individual claims procedurally defaulted, the Court must reject the argument that they accumulate to a *Brady* violation.

b. Claims Under *Napue/Giglio.*

1. *The Commonwealth sponsored perjured testimony from Officer Leo.*

Elliott claims that his rights were violated under *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) and *Giglio v. United States,* 405 U.S. 150, 153 (1972). A *Napue* claim "requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity." *Basden v. Lee,* 290 F.3d 602, 614 (4th Cir.2002). Elliott claims that Officer Thomas Leo falsely testified as to the date (January 2, 2001) he collected the blood containing Elliott's DNA from the back gate of the townhouse. The Virginia Supreme Court found this claim procedurally defaulted, and this Court concurs. *Elliott v. Warden,* 652 S.E.2d at 473.

Based on the inadmissible hearsay testimony of his state habeas investigator, Elliott alleges that the Commonwealth hid evidence that Officer Leo's testimony was false. The investigator claims that a retired police officer, Mr. Zinn, told him that Officer Leo collected the blood sample from the back gate within a day or two of January 2, 2001. By contrast, Officer Leo testified that he collected the sample on January 2, 2001, and contemporaneously recorded that date on the collection bag. Another officer, Detective Watson, supervised the collection and confirmed by sworn affidavit that it was done on January 2. Furthermore, there is no viable *Napue* claim because – even assuming Officer Leo's testimony was false – Elliott offers no basis for a belief that the prosecutor knew of this falsity. *Basden,* 290 F.3d at 614. Nor would the date of collection affect the admissibility of the evidence; the chain of custody was sound and it was properly authenticated. Thus, Elliott cannot show cause for default or resulting prejudice for this claim.

2. *The Commonwealth sponsored perjured testimony from Detective Hoffman and Gragg.*

Elliott next claims that Detective Hoffman testified falsely three times, that Gragg testified falsely about incriminating phone calls that she received from Elliott, and that the Commonwealth improperly "sponsored" the testimony of these witnesses. The Virginia Supreme Court also found these claims

procedurally defaulted. *Elliott v. Warden,* 652 S.E.2d at 472-473. Elliott does not proffer any cause for his default or prejudice resulting from the default. If he believed these witnesses were falsely testifying at trial, his counsel could have impeached them during cross-examination, called other witnesses to cast doubt on their credibility, or raised these issues on appeal. His failure to do so bars this Court from reviewing these claims under *Slayton,* 205 S.E.2d at 682.

3. *The alleged May 10, 2001 written statement.*

Elliott claims that Gragg testified that, during a smoke break on May 10, 2001, she told Detectives Hoffman and Masterson about a phone conversation with Elliott wherein he discussed "bloody bags" and "police swarming" at the scene. Elliott further claims that Gragg testified that one of the detectives wrote down what she said and had her initial and sign the written statement.

These claims attempt to recast Elliott's *Brady* claims on the smoke break conversation as *Napue* claims. For the reasons discussed above, such claims are procedurally defaulted. *Elliott v. Commonwealth,* 593 S.E.2d at 288; *Elliott v. Warden,* 652 S.E.2d at 472. Elliott argued that Gragg perjured herself to the Virginia Supreme Court on direct appeal, and the Court held the argument waived under Rule 5:25. *Elliott,* 593 S.E.2d at 286-287. Elliott offers no cause

excusing this default, and cannot show prejudice given that the comments allegedly made during the smoke break conversation were not helpful to his case.

Moreover, the record shows that the trial court considered the prosecutor's truthfulness about his lack of knowledge of these alleged written statements. As such, there is no *Napue* claim. *Basden,* 290 F.3d at 614 (*Napue* "requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity").

c. Miscarriage of Justice.

Lastly, Elliott argues that his procedurally defaulted claims should be considered by this Court because there has been a fundamental miscarriage of justice. *Murray v. Carrier,* 477 U.S. 478, 488 (1986). For there to be a miscarriage of justice, the defendant must be actually innocent of the capital crime, or innocent of the aggravating factor qualifying him for the death penalty. *Schlup v. Delo,* 513 U.S. 298, 301, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley,* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Neither circumstance is present here. Elliott was convicted of first degree murder and capital murder by a jury of his peers. The evidence at trial unequivocally proved that Elliott committed these murders. Police found blood containing his DNA on the inside of the padlocked back gate of the townhouse where the murders occurred. When police

questioned him the day after the murders, Elliott had an abrasion on his hand and bandages in his truck. Forensic testing a week later found blood bearing his DNA on a seat cushion in his truck.

Further, his truck was seen in the neighborhood by a witness minutes before neighbors reported hearing gunshots. Elliott even admitted to police that he had been in the neighborhood the morning of the murders and that he left his truck while there, but gave no explanation for why he would be more than 50 miles from his home at four in the morning. In addition, Elliott's obsession with Gragg, the victim Finch's ex-wife, gave him a clear motive. Gragg testified that Elliott called her early the morning of the murders, said that he was "tired of this s * * * and was going to take care of it" and hung up. He also called her after the murders and told her that "all of our problems had been taken care of," and later told her that he was looking for a place "to dump . . . these bloodied black trash bags from the mess that Jerry had made." Forensic analysis of the bullets recovered from the crime scene showed that each was fired from the same gun, thus precluding any inference of multiple killers.

Finally, the grisly detail of Elliott's murder of Dana Thrall supported the jury's finding of the "vileness" aggravating factor beyond a reasonable doubt. He shot a mother in her home with her two

small kids upstairs,[1] after killing her boyfriend in front of her. Elliott shot Ms. Thrall multiple times in her head and once in her chest – at close range, as evidenced by the defensive bullet wound to her hand. He pistol-whipped her in the head. He callously left her to die an agonizing death, with her children upstairs. Under these facts, the jury's finding of vileness was reasonable, and there was no miscarriage of justice.

V. Conclusion

For all of the reasons stated above, the Respondent's Motion to Dismiss must be granted and the Elliott's Petition for Writ of Habeas Corpus must be dismissed in full. All other pending motions in this matter are hereby deemed moot. The stay of execution entered by Order of this Court on May 6, 2008, is hereby lifted.

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[1] Given that Elliott admitted he had been to the house "hundreds of times," the jury could infer that Elliott knew Thrall lived in that house with her kids.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LARRY BILL ELLIOTT,	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 1:08cv430
	)	
LORETTA K. KELLY,	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, filed concurrently herewith, it is hereby ORDERED that:

(1) Respondent's Motion to Dismiss (Dkt. No. 26) is granted;

(2) the Petition for Writ of Habeas Corpus (Dkt. No. 22) is dismissed in full;

(3) all other pending motions in this matter (Dkt. Nos. 31, 38, 39, 40, 41, 42, 43, 46, 47, 51, 57, 74, 75) are deemed MOOT; and

(3) [sic] the stay of execution entered by Order of this Court on May 6, 2008, (Dkt. No. 9) is hereby LIFTED.

ENTERED this 31st day of March, 2009.

Alexandria, Virginia

/s/ LOG
Liam O'Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LARRY BILL ELLIOTT,	)	
Petitioner,	)	
	)	
v.	)	Case No.: 1:08-cv-430
	)	
LORETTA K. KELLY,	)	
Respondent.	)	

ORDER

This order comes upon consideration of Petitioner Larry Bill Elliott's Motion for Certificate of Appealability (Dkt. No. 86). For the reasons stated in the Court's Memorandum Opinion issued on March 31, 2009, Petitioner does not present "a substantial showing of the denial of a constitutional right." *Beck v. Angelone,* 261 F.3d 377, 386 (4th Cir. 2001) (quoting 28 U.S.C. § 2253(c)(2)). The Court therefore DENIES Petitioner's Motion.

It is so ORDERED.

ENTERED this 7th day of May, 2009.

Alexandria, Virginia

/s/ LOG
Liam O'Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LARRY BILL ELLIOTT, Petitioner,	)	
v.	)	Case No.: 1:08cv430
LORETTA K. KELLY, Respondent.	)	

ORDER

This matter comes before this Court on Petitioner's Motion to Amend or Alter Judgment (Dkt. No. 84). As indicated in the Memorandum Opinion issued on March 31, 2009 (Dkt. No. 82), the Court found no factual issues requiring an evidentiary hearing or further discovery that would entitle Mr. Elliott to habeas relief. A habeas petitioner is entitled to an evidentiary hearing "on facts not previously developed in the state court proceedings" only "if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963)." *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006). Further, "a federal court is not permitted to grant relief to a habeas corpus petitioner unless the error of which he complains had a 'substantial and injurious effect or influence' on the outcome of the underlying state court proceeding." *Id.* (internal quotations omitted).

For the reasons given in the Court's Memorandum Opinion, none of the *Townsend* factors is satisfied here, and there was no error having a "substantial and injurious effect or influence on the outcome" of the state proceedings. *Id.* The merits of the factual disputes were resolved adequately in the state court proceedings after a full and fair hearing, the state factual determination was fairly supported by the record as a whole, and there was no substantial allegation of newly discovered evidence entitling Mr. Elliott to relief. *Id.* at 582 n.16.

Accordingly, it is hereby ORDERED that Petitioner's Motion to Amend or Alter Judgment is DENIED.

ENTERED this 15th day of April, 2009.

Alexandria, Virginia

/s/ LOG
Liam O'Grady
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-5
(1:08-cv-00430-LO-JFA)

LARRY BILL ELLIOTT,

Petitioner-Appellant

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,

Respondent-Appellee

ORDER

(Filed Jul. 7, 2009)

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge King and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

USCS Const. Amend. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

USCS Const. Amend. 8

Bail – Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

USCS Const. Amend. 14 § 1

Sec. 1. [Citizens of the United States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS 2254].

Fed. R. App. P. Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the

court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Va. Code Ann. § 19.2-264.4 (2009)

§ 19.2-264.4. Sentence proceeding

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of 19.2-299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include

the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) even if 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life; or (ii) imprisonment for life and a fine of $

Signed foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

APPENDIX C

We, the jury, on the issue joined, having found the defendant, LARRY BILL ELLIOTT, guilty of Capital Murder in that he did willfully, deliberately and premeditatedly kill more than one person as part of the same act or transaction, and having considered all the evidence in aggravation and mitigation of the offense and having unanimously found the the [sic] evidence fails to establish beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture; and/or depravity of mind; and/or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, fix his punishment at:

☐ Imprisonment for life, OR

[Check one]

☐ Imprisonment for life, and a fine of $_____

_____
FOREPERSON

_____
PRINT FOREPERSON'S NAME

_____
DATE

COMMONWEALTH OF VIRGINIA
vs. CR#51115
LARRY BILL ELLIOTT

5626

C-2

We, the jury, on the issue joined, having found the defendant, LARRY BILL ELLIOTT, guilty of Capital Murder in that he did willfully, deliberately and premeditatedly kill more than one person as part of the same act or transaction, and having found unanimously and beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture; and/or depravity of mind; and/or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered all the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ Fred Barfield
FOREPERSON

FRED BARFIELD
PRINT FOREPERSON'S NAME

4/4/03
DATE

COMMONWEALTH OF VIRGINIA
vs. CR#51115
LARRY BILL ELLIOTT

OPPOSITION BRIEF

143

No. 09-444

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. MIMS
Attorney General of Virginia

JERRY P. SLONAKER
Senior Assistant Attorney General

MATTHEW P. DULLAGHAN
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-4073
(804) 786-0142 (fax)
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTIONS PRESENTED

1. Should certiorari be granted to decide whether the Fourth Circuit applied the proper standard in denying a Certificate of Appealability where its order states that it reviewed the submissions by the parties, all of which argued for application of the same proper standard, and where the petition for rehearing in the Fourth Circuit failed to allege that it had not applied that standard?

2. Should certiorari be granted to decide whether the order entered by the Fourth Circuit denying a Certificate of Appealability applied the correct standard where nothing in the record calls into question the fact that it did apply the correct standard?

3. Should certiorari be granted to decide whether the Fourth Circuit correctly decided that the petitioner failed to establish "a substantial showing of the denial of a constitutional right" from the following rulings:

   a. the district court's dismissal of the habeas petition without an evidentiary hearing;

   b. the district court's agreement with the state court's refusal to allow into evidence the results of a polygraph test; and

   c. the district court's agreement with the state court's finding that trial counsel was not ineffective for failing to object to a verdict form that correctly stated Virginia law.

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STATEMENT OF THE CASE

I. Proceedings

Larry Elliott murdered Dana Thrall and Robert Finch on January 2, 2001, shooting them after breaking into their residence. Thrall's two sons, aged six and four, were in the home. A jury in the Circuit Court of Prince William County, Virginia, found him guilty of capital murder and sentenced him to death, but the trial court granted a new trial.

A new jury found Elliott guilty of the capital murder of Dana Thrall in the commission of the killing of Robert Finch. *See* Va. Code § 18.2-31(7). It also found him guilty of the first-degree murder of Robert Finch. The jury sentenced Elliott to death for the capital murder, finding that Elliott's conduct met Virginia's vileness aggravating circumstance.

The Supreme Court of Virginia unanimously affirmed Elliott's convictions and sentences, *Elliott v. Commonwealth*, 593 S.E.2d 270 (Va. 2004), and denied Elliott's petition for rehearing on June 17, 2004. On January 10, 2005, this Court denied Elliott's petition for a writ of certiorari. *Elliott v. Virginia*, 543 U.S. 1081 (2005).

Elliott filed a habeas corpus petition in the Supreme Court of Virginia that the court dismissed on November 2, 2007. *Elliott v. Warden*, 652 S.E.2d 465 (Va. 2007). The court denied Elliott's petition for rehearing.

The trial court set an execution date for May 13, 2008, as required by Virginia Code § 53.1-232.1. On May 6, 2008, the United States District Court for the Eastern District of Virginia stayed Elliott's execution and appointed counsel to file a federal habeas corpus petition, which Elliott filed on July 3, 2007. The district court denied and dismissed all of Elliott's federal habeas corpus claims. *Elliott v. Kelly*, Case No. 1:08cv430, 2009 U.S. Dist. LEXIS 27573 (E.D. Va. Mar. 31, 2009), and denied Elliott's subsequent "Motion to Amend or Alter Judgment." (Pet. App. A-76). The district court denied Elliott's application for a Certificate of Appealability ("COA"). (Pet. App. A-75). The United States Court of Appeals for the Fourth Circuit also denied Elliott's application for a COA. (Pet. App. A-1). It denied Elliott's petition for rehearing on July 7, 2009. (Pet. App. A-78).

The trial court scheduled Elliott's execution for October 5, 2009. On September 16, 2009, the Governor of Virginia granted a reprieve to November 17, 2009. On October 13, 2009, Elliott filed in this Court a petition for a writ of certiorari.

II. Facts Of Elliott's Crimes

The Virginia Supreme Court found the facts concerning Elliott's crimes as follows:

> At approximately 4:00 a.m. on the morning of January 2, 2001, Mary Bracewell, a newspaper delivery person, was traveling her route in the Woodbridge community of

Prince William County, Virginia. Bracewell was aware that there had been several recent vehicle break-ins in the neighborhood and became suspicious when she saw a man standing beside a pick-up truck parked on Belfry Lane. Bracewell observed the man, who appeared to be carrying a flashlight, walk to the north end of Belfry Lane, cross the street, walk onto a grassy area between two townhouses, and then disappear from her view. Bracewell called police on her cellular telephone to report her observations.

At 4:15 a.m., Officer Marshall T. Daniel of the Prince William County Police Department received a radio dispatch directing him to respond to Bracewell's call. He arrived at Belfry Lane three minutes later. Bracewell indicated the parked pick-up truck to Daniel and related to him what she had observed. Daniel noted that the pick-up truck, which was locked, had a Department of Defense windshield identification sticker and that there was a cellular telephone on the passenger seat.

At 4:27 a.m., Officer Daniel received a radio call to respond to a report of a domestic disturbance at a townhouse located at 3406 Jousters Way. Jousters Way is located approximately 300 yards north of Belfry Lane. Although the two streets do not intersect, one can reach Jousters Way on foot from Belfry Lane by walking in the same direction that Bracewell had seen the man beside the pick-up truck walking.

Tina Miller, who lived in an adjoining townhouse, had made the report of a domestic disturbance at 3406 Jousters Way. Miller telephoned police after being awakened by a crashing sound coming from 3406 Jousters Way at approximately 4:20 a.m. As she placed the call, Miller heard three or four "hollow" sounds followed by "the most horrible scream" she had ever heard. Miller thought that the screaming voice sounded like that of Thrall, one of the occupants of 3406 Jousters Way. . . .

Officer Scott Bigger of the Prince William County Police Department arrived at 3406 Jousters Way at 4:25 a.m. . . .

. . . Looking through a gap between the shades of a front window, Officer Daniel was able to see the legs of a person lying prone and motionless in the foyer of the home. Officer Bigger opened the unlocked front door and he and Officer Daniel saw Finch, who lived with Thrall in the home, lying on the floor dead. Finch had suffered three gunshot wounds: one to his head, one to his back, and one to his chest.

Officer Daniel immediately returned to the back of the home to secure that area while Officer Bigger waited at the front of the home for additional officers to arrive. When those officers arrived, Officer Daniel immediately returned to the location on Belfry Lane where the pick-up truck had

been parked. He arrived at that location at 4:38 a.m. The truck was gone.

Officer Sheldon R. Creamer, one of the officers who had responded to the call by the other officers for assistance, arrived at 3406 Jousters Way at approximately 4:45 a.m. Entering the home, he heard "a muffled breathing sound" coming from the kitchen at the back of the home. In the kitchen he found Thrall, shot and lying in a pool of blood. Emergency medical [personnel] called to the scene took Thrall by ambulance to a helicopter, which in turn evacuated her to the Washington Hospital Center in the District of Columbia, where she later died. Thrall had suffered multiple gunshot wounds including a defensive wound to her right hand, three to her head, and one to her chest. She also suffered a blunt force trauma to the back of her head consistent with a pistol-whipping.

. . . Meanwhile, because Officer Daniel had reported seeing a child looking out of a second floor back window, Officer Bigger reentered the home and went upstairs. There he found Thrall's two sons, aged six and four, who were crying and upset. Police officers removed the children from the home. . . .

Officer Thomas Leo . . . found a blood-stain on the inside of the gate of the privacy fence. Subsequent DNA testing of this sample showed that it was consistent with

Elliott's DNA to a degree that a match would occur "once in the entire world population."

. . . Detective Hoffman and another detective traveled to Fort Meade in Hanover, Maryland, where Elliott worked as a civilian employee for the United States Army as a counterintelligence expert. . . . The detectives located the truck in a parking lot at Fort Meade, and Detective Hoffman observed that there was a flashlight, a cellular telephone, and a box of bandages on the seat of the truck. . . .

Elliott told the detectives that he was aware that Gragg and Finch were involved in a dispute regarding the custody of their two children. Elliott related that Gragg had traveled to Florida over the New Year's holiday and had taken the children with her. He further related that Gragg had told him that she was having car trouble and would not be able to return to Virginia with the children in time to return them to Finch at 2:00 p.m. on New Year's Day as she was required to do under a visitation agreement. Elliott claimed that he had driven to Gragg's residence in the early afternoon of New Year's Day "in case Robert Finch showed up so that [Elliott] could explain to him the problems Rebecca was having with getting back." Elliott denied he had any relationship with Gragg other than as her employer. He also denied knowing Finch and claimed that he had seen him only once.

Although Detective Hoffman told Elliott that his truck had been seen in Finch's neighborhood in the early morning hours of the day of the murders, Elliott denied having been in the area. Elliott claimed that he had spent the night of January first to second sleeping in his truck at a rest area in Maryland.

. . . Elliott [later] admitted the true nature of his involvement with Gragg. . . .

Elliott further admitted that he knew where Finch lived and that, after he had gone to Gragg's house on the afternoon of January 1, 2001, he had driven to Finch's house. He denied getting out of his truck, however, and claimed that he had seen "a black man with a slinky walk going to the front door of the home." . . .

Elliott admitted that after calling Gragg, he drove to Finch's neighborhood. He admitted leaving his truck, claiming that he did so only because he needed to urinate. Elliott stated that after urinating by a guardrail on the side of the road, he walked by Thrall's and Finch's townhouse. He denied going onto the property and stated that he had not heard gunshots, a scream, or anything unusual. At the conclusion of this interview, Detective Hoffman took a photograph of an abrasion he had noticed on one of Elliott's hands.

On January 4, 2001, Gragg, . . . admitted receiving a telephone call early on the morning of the murders, but claimed that the call had come from Finch. Gragg claimed that Finch had threatened to call the police if she did not return their children to him that afternoon. Gragg also told the detectives that she did not believe that Elliott had committed the murders.

. . . On May 10, 2001, . . . Gragg told the police that the telephone call she had received early on the morning of the murders was not from Finch, although initially she had assumed it was because the connection was not good and she could not hear the caller clearly. Gragg then related that when the caller realized that she thought she was talking to Finch, the caller said he was "tired of this s*** and was going to take care of it" and hung up. Gragg then realized that the call had come from Elliott. . . .

. . . Elliott told her that "all of our problems had been taken care of." . . . Later, Elliott told Gragg that he was looking for a place "to dump . . . these bloodied black trash bags from the mess that Jerry had made."

Gragg told the police that she had not been truthful in her prior interviews because she was afraid of Elliott and "Jerry," because Elliott had once told her that "Jerry" was watching her and that he would kill her or her family if she went to the police. Once Elliott was in custody and the police had

> assured her that there was no "Jerry," she stated that she had decided to be truthful. Gragg's attorney confirmed that she had told him on several occasions that she feared Elliott would harm her if she told the police what she knew.

Elliott, 593 S.E.2d at 273-78.

III. Elliott's Misstatements of Facts

In addition to misstatements or errors otherwise identified herein, Elliott's petition contains the following misstatements or misleading descriptions of facts:

- In his "Statement of the Case," Elliott incorrectly asserts that Gragg "told jurors that *the only reason* she dramatically changed her story to implicate Elliott after four months of denying any knowledge of the crimes was because police told her that Elliott had been taken into custody and she no longer feared he would harm her if she told the truth." (Pet. 4) (emphasis original). In fact, the jury was fully informed about every detail of the interaction between Gragg and the police. The *only* thing the trial judge would not permit was the use of the word "polygraph." (JA 680). The trial court permitted full cross examination on the fact that the police repeatedly interviewed Gragg, that they believed she was lying about her participation, that they threatened to charge her if she did not tell the truth, and that only

then did she implicate Elliott. (JA 1626, 1637, 1641-57, 1663).[1] The issue of whether the word "polygraph" could be used was extensively argued in the trial court and on direct appeal in the Virginia Supreme Court. (JA 671-80); *Elliott*, 593 S.E.2d at 282. Elliott's assertion in this Court that he was in any manner curtailed from a full cross-examination of Gragg is a blatant misrepresentation of the record.

• In his "Factual Background," Elliott asserts that the Thrall's six-year-old son "said that he saw 'a black man running out of' the townhouse 'right after the murders.'" (Pet. 10). The only source for the assertion is highly unreliable and inadmissible double hearsay. William Thrall, the two boys' grandfather, stated only that he "heard" that one of the boys made a statement about "either a black man or a man wearing black" running from the scene (Resp. App. 2), but he nowhere alleged that he "heard" that the boy told the police, much less whether he heard about it secondhand, or third, or just as a rumor. Elliott's habeas investigator's affidavit recites only hearsay that the boy's uncle, Cameron Thrall, thought that the boy "referred" to a black man running from the scene; the investigator likewise failed even to allege whether the uncle witnessed the hearsay or just heard about it. (Resp. App. 4). The investigator also

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[1] In this brief, the Warden will refer to the direct appeal joint appendix filed in the Virginia Supreme Court as "JA ___." No Joint Appendix was filed in the Fourth Circuit. The Warden has provided the Court with a copy of the state Joint Appendix.

claimed that Officer Kovach acknowledged talking to the boys, but made *no claim* about the contents of the conversation. (Resp. App. 3-4). Tina Miller, the neighbor who called 911, saw the boys with a detective but did not know what, if anything, was said. (Resp. App. 5).[2] Elliott fails to mention to this Court the fact that sworn affidavits from the police and prosecutors during the state habeas case absolutely refuted the notion that they had any evidence that the boys said anything about the crimes or the killer. *Elliott*, 652 S.E.2d at 471.

- In his "Factual Background," Elliott asserts that he "established that the police received records from the cell carrier regarding the location of that cell tower, but redacted it from the records provided to the defense. HR 5627-29." (Pet. 12). However, there is no evidence that the proprietary data was not redacted by the cell carrier, before providing it to the police; Elliott's citation is only to the information as provided to Elliott's counsel.

- In his "Factual Background," Elliott asserts that the trial judge "found that jurors could conclude that Elliott never went into the townhouse and that one or two other unknown individuals whose DNA

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[2] The police arrived on the scene within only a few minutes after the shooting and the infant boys were discovered upstairs by a police officer who was one of many on the scene and who saw the boys looking out of a second-story window. *Elliott*, 593 S.E.2d at 275. (JA 1256-57). Even if one of the boys said he saw a black man outside, it probably was one of the officers.

was found at the scene actually committed the murders. HR 1857-58." (Pet. 13-14). The assertion contains two errors. First, the trial judge in fact said "that the Jury could infer from this evidence . . . that [Elliott] was in fact there. . . . They could infer that [Elliott] was in or about the scene and that someone else was inside." (JA 1857-58). Second, there was no DNA evidence establishing the presence of "one or two other unknown individuals." In fact, the DNA expert at trial explained that the DNA in the blood sample from the front door was not a mixture; it matched Thrall and eliminated Finch and Elliott (JA 1810, 2590 (item 4)). The DNA in the blood sample from the back door was a mixture that matched Thrall and another person who may have been Finch. (JA 1824-25). The DNA detected on Finch's jeans was a mixture which matched Finch and another person who may have been Thrall. (JA 1825-26). The trial expert eliminated Elliott from the DNA in each mixture. (JA 1824-26). Elliott simply fails to provide this Court with all the facts and expert opinions presented at trial.

• In his "Factual Background," Elliott asserts the existence of "[n]umerous significant questions about the drop of blood" found on the back gate. (Pet. 13 n.6). Elliott's "questions" are based on the inadmissible hearsay statement of his habeas investigator who says that a retired police officer told the investigator that "they went back within not more than 2 days or maybe the next day to collect the blood from the back gate." (Resp. App. 3). Elliott fails to inform

this Court about the trial and state habeas records. Officer Leo, who actually collected the evidence, testified under oath at trial that he collected it on the date of the murder. (JA 1309-10). His own contemporaneous record of the date on the evidence bag confirmed that fact. (JA 1306). Detective Watson, who actually discovered the blood stain on the gate on January 2, 2001, confirmed Officer Leo's trial testimony in his sworn, unrefuted affidavit submitted in the state habeas case. (Resp. App. 6).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

As he did in the Court of Appeals, Elliott argues as though his case were on direct appeal of his criminal conviction. He pays only lip service to the fact that he brought a habeas action, citing 28 U.S.C. § 2254 only twice in his entire petition. He makes no mention of the procedural defaults found by the state and federal courts, or of the deference the federal courts were required to show to the factual findings and reasonable legal holdings of the state courts pursuant to §§ 2254(e)(1) and 2254(d). Elliott re-casts the rulings of the courts below, and simply re-argues the disputes already resolved against him. His petition presents no compelling reason to grant certiorari.

I. Elliott did not preserve his argument about the Certificate of Appeal standard, and the record does not support it.

Under 28 U.S.C. § 2253(c)(2), the petitioner is required to make "a substantial showing of the denial of a constitutional right" before a federal court may grant a COA. "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

> The petitioner's arguments ultimately must be assessed under the deferential standard required by 28 U.S.C. § 2254(d)(1): Relief may not be granted unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Tennard v. Dretke, 542 U.S. 274, 282 (2004). The nature of the penalty does not lessen, or change, the standard of review which requires a determination of whether there has been a substantial showing of the denial of a constitutional right. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

When the district court did not grant a COA, Elliott filed a motion specifically requesting that it do so. He urged exactly the same statutory standard for which he now argues. Elliott misstates the record when he asserts that the district court denied his motion "because it had denied the habeas corpus

petition." (Pet. 15 n.8). The district court clearly stated that it applied the statutory standard proposed by Elliott, but found he failed to satisfy it: "Petitioner does not present 'a substantial showing of the denial of a constitutional right.' *Beck v. Angelone*, 261 F.3d 377, 386 (4th Cir. 2001) (quoting 28 U.S.C. § 2253(c)(2))." (Pet. App. A-75).[3]

Elliott again proposed the same standard in his COA motion in the Fourth Circuit. The Warden did not disagree with the standard and argued only that Elliott had failed to meet it. Elliott did not argue that the district court had not applied the correct standard. In his petition for rehearing in the Fourth Circuit, he did not argue that that court had applied the wrong standard. Elliott asserted instead that rehearing was appropriate "because 'material factual . . . matters [were] overlooked in the decision' and because its opinion 'is in conflict with a decision of the United States Supreme Court, this Court or another court of appeals and the conflict is not addressed in the decision[.]' FRAP 35(b)(1)(A); Local Rule 40(b)(i), (b)(iii)." (Pet. Reh. at 2). But he did not allege any conflict "with the standard set out in *Miller-El I* and *Slack,* and used by other Circuits in determining requests for COA" as he now claims in this Court in his "Question Presented."[4] The standard for review of a motion for a COA never has been an issue in this

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[3] The district court ruled before the Warden could respond.

[4] Elliott's certiorari petition fails to identify any such cases from other circuits.

case and there never has been disagreement over it. The lower courts simply, and properly, found that Elliott could not meet the settled, uncontroversial standard.

In any event, the Fourth Circuit's COA order is exactly consistent with the expedited review of such claims intended under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Congress expressly intended to reduce the number of appeals which did not show "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336.

Elliott cites *Netherland v. Tuggle*, 515 U.S. 951 (1995), as his only authority for his argument that lower federal courts always must explain fully their reasoning rather than simply ruling on the motion presented to them. However, his argument "ignore[s] another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *See Parke v. Raley*, 506 U.S. 20, 29 (1992), *citing Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). Indeed, courts are presumed to act in

accordance with the law, and orders are entitled to that presumption of regularity.[5]

The Fourth Circuit, in denying a COA, stated that it had reviewed all the "submissions relative to the appellant's motion for certificate of appealability" (Pet. App. A-1), all of which set forth exactly the same statutory standard. There can be no realistic concern that the Fourth Circuit has "fundamentally misconstrued its obligations" (Pet. 15) or applied the wrong standard to deny a COA. Elliott did not object below on this basis and he presents this Court with no unsettled issue of federal law or split among the circuits. He thus presents no compelling reason to grant certiorari.

II. The district court's denial of an evidentiary hearing presents no compelling reason to grant certiorari.

Elliott argues that the district court could not dismiss his petition without an evidentiary hearing

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[5] This Court's primary concern in *Tuggle* was not with the summary nature of the order. Rather, this Court reviewed the procedural history of the case and held that "the inescapable conclusion is that the Court of Appeals mistakenly believed that a capital defendant as a matter of right was entitled to a stay of execution until he has filed a petition for certiorari in due course." 515 U.S. at 882. This Court did not vacate the stay in *Tuggle* because it could not conclude what standard had been applied, but because it could, and did, conclude that the Court of Appeals had applied an unjustified one. *Id.* The same cannot be said here.

because Federal Rule of Civil Procedure 12(b)(6) required it to accept his allegations in the light most favorable to the petitioner. Elliott fails to acknowledge the role of the "substantially higher" burden imposed by AEDPA for any federal habeas review of a state court decision. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Indeed, his argument to this Court fails even to mention § 2254(e)(2), much less his burden under that section which bars most hearings in federal court.

More fundamentally, Elliott fails even to argue, much less establish, "a substantial showing of the denial of a constitutional right" from the district court's correct decision not to hold an evidentiary hearing. Elliott's argument is limited to his alleged procedural right to an evidentiary hearing, without any connection between the denial of a hearing and any denial of a constitutional right. He fails to show that the ruling caused the dismissal of any constitutional claim, much less that the ruling itself denied him any constitutional right. *See Slack*, 529 U.S. at 484-85. Absent a showing that the asserted error resulted in the denial of a constitutional right, Elliott certainly presents no issue worthy of certiorari review.

Moreover, Elliott wrongly relies on Rule 12(b)(6) as the standard for when a hearing is permitted. In a federal habeas case, the federal court is not free to accept as true assertions of fact which are at odds with the findings of the state court. Indeed, under 28 U.S.C. § 2254(e)(1), the federal court is obliged to

presume correct the findings of the state court, and not the petitioners' contrary allegations. *Landrigan*, 550 U.S. at 474. Facts found by the state supreme court enjoy the same presumption. *Sumner v. Mata*, 449 U.S. 539, 546 (1981). Elliott's argument that his bare allegations should have been given controlling weight ignores the statute and the respective roles of the state and federal courts in collateral review.

Elliott says that the district court conducted a *de novo* review of his claims, "eschewing the restrictions of the AEDPA." (Pet. 7 n.8). He relies on the arguments he made below that AEDPA was not a bar to relief, and he asserts that the district court, in listing the dismissal of his claims under the caption, "Merits Review," thereby rejected the AEDPA standard. (*Id.*). Elliott's assertion is directly at odds with the district court's opinion: the opinion clearly set forth the AEDPA standard and nowhere adopted Elliott's arguments that AEDPA did not apply. (Pet. App. A-18 – A-20). Of course, no district court is authorized simply to "eschew" AEDPA. It would have to find, explicitly, that the petitioner had established that the state court adjudication was unreasonable before proceeding to a *de novo* review. 28 U.S.C. § 2254(d). Only a strained reading of the district court's opinion would conclude that the court, which announced the standard required under § 2254(d), and then agreed with the state court's holdings, nevertheless made a secret, unstated finding that the state court findings were unreasonable.

In fact, the district court rejected the very findings which Elliott now urges in order to accept his arguments. With respect to his verdict form claim, Elliott's entire argument below was as follows:

> **The AEDPA Does Not Bar Relief.** The VSC unreasonably determined that the verdict form was a correct statement of law. 652 S.E.2d at 486. The VSC decision was contrary to, or an unreasonable application of, federal law in that it required the jury to be unanimous when that was not a requirement of the statute. *See* the *Sullivan* Line of Cases.

(Fed. Habeas Pet. 49). The district court rejected any unreasonableness when it expressly found that Virginia "juries must decide criminal cases and sentencing by unanimous verdict," and that "the verdict form conformed to Virginia law." (Pet. App. A-48).

With respect to his claim about polygraph evidence, Elliott argued below that AEDPA was not a bar because the Virginia Supreme Court supposedly did not adjudicate his claim: it allegedly had "unreasonably treated Elliott's request as an effort to introduce a videotape of Gragg's polygraph examinations into evidence," while his trial counsel had instead "asked that he be permitted to impeach [Gragg] by asking her if she was 'told you failed the polygraph.'" (Fed. Habeas Pet. 63) (underlining in original). But the only authority Elliott argued below to support his claim that the ruling limited his right to cross-examination in violation of the Confrontation

Clause was *Davis v. Alaska*, 415 U.S. 308 (1974), a case standing for the narrow proposition a State may not prohibit cross-examination about a witness's juvenile record. (*Id.* at 63-64). The district court rejected Elliott's characterization of the ruling by the Virginia Supreme Court, and agreed with the state court: "the trial court made a reasonable decision to exclude evidence of Gragg's polygraph tests. Refusing to allow cross-examination on inadmissible polygraph evidence did not violate the Confrontation Clause." (Pet. App. A-59). And, as discussed above, Elliott was *not* prevented from thoroughly cross-examining Gragg about her interaction with the police and about the fact that she implicated Elliott only after the police caught her lying to them and threatened to charge her. The district court's dismissal of the polygraph claim was the only available decision given the clear precedent from this Court upholding the inadmissibility of polygraph results. *See United States v. Scheffer*, 523 U.S. 303 (1998); *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam) (defendant not even entitled to disclosure of polygraph test results on government's key witness). Indeed, any other ruling would have violated the prohibition against new-rule-making on collateral review. *See Saffle v. Parks*, 494 U.S. 484, 488 (1990) (federal court required to validate good-faith, reasonable state court decisions).

Elliott imagines an artificially narrow view of the state courts' findings, ignoring the necessary implications of the verdict in the trial court. Particularly where the Commonwealth has relied on circumstantial

evidence, the jury's verdict is a rejection of any hypothesis of innocence argued by the defense. It is on the basis of that record that the state appellate court made specific findings that the evidence at trial, where it was in dispute, had been resolved in favor of the Commonwealth.

Elliott also completely ignores the findings made by the state habeas court: each statement of its conclusions from the record is also a finding of fact and entitled to deference. Virginia habeas courts always can weigh affidavits, even opposing ones, and reject a petitioner's habeas allegations wholly on the affidavits and the record. *Shaikh v. Johnson*, 666 S.E.2d 325, 331 (Va. 2008); *Yeatts v. Murray*, 455 S.E.2d 18, 20-21 (Va. 1995). "Virginia is not bound by the Constitution to provide collateral review, *Pennsylvania v. Finley*, 481 U.S. 551 (1987), much less to provide review of a particular scope." *Clanton v. Muncy*, 845 F.2d 1238, 1243 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988). "The mere fact that the state court dismissed the habeas petition on the basis of affidavits, without granting an evidentiary hearing, does not disturb the presumption of correctness under § 2254(d)." *Carter v. Johnson*, 131 F.3d 452, 460 n.13 (5th Cir. 1997); *accord*, *Bell v. True*, 413 F. Supp. 2d 657, 678 (W.D. Va. 2006), *affirmed*, 260 Fed. Appx. 599 (4th Cir.), *cert. dismissed*, 129 S.Ct. 393 (2008).[6]

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[6] Elliott argues that it was inconsistent for the Warden to argue in state habeas that an evidentiary hearing was not

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Elliott complains that the Supreme Court of Virginia rejected certain of his evidence as hearsay but then supposedly credited alleged hearsay offered by the Warden.[7] (Pet. 19 n.10). Elliott, however, mischaracterizes the evidence. The Warden presented no hearsay. Consistent with Virginia law, the Warden submitted sworn affidavits from the prosecutors, the detective who investigated the murders, two other police officers, and the officer in charge of the polygraph records. In the portion of the state habeas opinion cited by Elliott, the Virginia Supreme Court relied on sworn statements: that the prosecutors were aware of only two polygraph examinations; that the official records of the police showed only two tests; and that neither the prosecutor nor the police were aware of any purported statement by the victim's children that they saw a man running from their home. *Elliott*, 652 S.E.2d at 471-72. Each of these statements was within the personal knowledge of the affiant; moreover, Elliott's claims under *Brady v. Maryland*, 373 U.S. 83 (1963), necessarily charged each prosecutor with the knowledge of all other prosecutors, the records of their office, and the records of

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necessary while at the same time presenting affidavits to dismiss the case. (Pet. 18-20). But, as shown, Virginia law favors the resolution of post-conviction, collateral claims by reliance on the existing record and sworn affidavits unless the claim presents allegations of fact which cannot be resolved without a hearing.

[7] Elliott fails to identify where he earlier has objected to any of the Warden's evidence as "hearsay."

the police investigations. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995). By contrast, the state habeas court found that Elliott's affidavits alleged only statements reported to the affiant second-hand, or even third-hand, and that the affiants could not have testified to those declarations even at trial. 652 S.E.2d at 471, 475-76. Elliott's observation that the Warden did not offer affidavits to dispute his unreliable hearsay (Pet. 20) is meaningless: he claimed a *Brady* violation; the Warden's affidavits established no knowledge by the prosecutor or law enforcement of the alleged information.

In a further effort to imply that the state habeas findings should not be given the deference required by statute, Elliott attempts to characterize the rejection of one of his *Brady* claims – a claim he did not pursue on appeal or now – as based on a "circular argument." (Pet. 21). But it is Elliott who is out of line. Elliott complains that he cannot show what information was withheld, or that it is in fact exculpatory because it was withheld. (*Id.*). He asserts that he should not have been required to come forward with specific evidence in support of his claim in habeas. He says that it was enough simply to assert that exculpatory information about the cell phone towers was redacted by the prosecution, because of his own allegation that it was withheld at trial. (Pet. 20-21). However, the prosecution is not required to disclose any information in aid of a habeas claim. *See District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2320 (2009) (*Brady* obligation does not extend

to habeas corpus proceedings). Elliott was required to support his allegations with facts showing that the prosecution, not the telephone company, withheld information, and that the information was in fact exculpatory. But Elliott admitted he was in the neighborhood of the murders at the time of the killings (JA 1437-38) and a witness placed him there with his truck minutes before the murders. (JA 1190, 1195-97). Elliott also admitted he telephoned Gragg at the time she testified he called. (JA 1438-39). His location during the call was irrelevant because, whether at a restaurant as Gragg implied, or at the Army Base as Elliott later claimed, he could have murdered Finch and Thrall and still arrived at the Base when he said he had arrived.

Elliott's last criticism of the findings of the state habeas proceedings argues that the rejection of his ineffective assistance claim alleging a failure to present alibi evidence – a claim he did not appeal below or now – relied on insufficient evidence that Elliott's truck was seen in the area. (Pet. 22). Elliott ignores the positive testimony of Mary Bracewell, the newspaper delivery person, and Officer Daniel, that both recognized a photograph of Elliott's truck as the same truck they saw at the time of the murders, about 300 yards from the townhouse. (JA 1191, 1235, 1238). Elliott simply re-argues the fact-bound disputes already resolved against him below, some of which he never appealed, and thus are not a proper subject for a grant of certiorari.

In denying Elliott's motion for rehearing, the district court found as follows:

> The merits of the factual disputes were resolved adequately in the state court proceedings after a full and fair hearing, the state factual determination was fairly supported by the record as a whole, and there was no substantial allegation of newly discovered evidence entitling Mr. Elliott to relief.

(Pet. App. A-77). Decisions to hold or deny an evidentiary hearing are reviewed only for an abuse of discretion. *See Robinson v. Polk,* 438 F.3d 350, 367 (4th Cir. 2006). The state court findings properly were presumed to be correct under § 2254(e)(1), and the district court clearly did not abuse its discretion. Elliott presents no uncertainty in the law or conflict and no compelling reason to grant a COA, much less to grant certiorari.

III. The district court's decision on the polygraph evidence presents no issue which compels a grant of certiorari.

Elliott argues that the district court, and the Fourth Circuit, wrongly denied him relief by misapplying the categorical rule against polygraph evidence. To the contrary, the district court carefully and properly applied settled precedent to a full review of the record.

At trial, the Commonwealth argued that evidence of polygraph test results is unreliable and inadmissible in Virginia and that Elliott would not be prejudiced by the exclusion because Gragg could be subjected, as she had been in the first trial, to extensive impeachment on the material fact that she lied to the police, without revealing the irrelevant fact of the polygraph. (JA 675-80). In excluding the evidence of the polygraph test results, the trial court detailed the permissible cross-examination:

> It allows you to bring before the jury the fact that she made a prior inconsistent statement and allows you to argue before the jury the reason why she made this statement, how it's a product of the police confronting her, telling her she's a liar, et cetera, in a sufficiently effective way without getting into this morass of polygraph, no polygraph, passing, failing and the like.

(JA 680). That ruling faithfully followed settled precedents holding that evidence of a polygraph examination is inadmissible for *any* purpose, *see Wood v. Bartholomew*, 516 U.S. 1, while ensuring that Elliott would be able to cross-examine the witness fully. On direct appeal, the Supreme Court of Virginia reasonably upheld the trial court's ruling. *Elliott*, 593 S.E.2d at 282.

The federal district court relied upon settled precedent and found that the state court decision was reasonable. (Pet. App. A-59 – A-60) (citing *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986), and

United States v. A & S Council Oil Co., 947 F.2d 1128, 1133 (4th Cir. 1991)). The issue simply was not debatable.

A criminal defendant is not entitled even to *disclosure* of the polygraph test results of a government's key witness in a capital murder case. In *Wood*, 516 U.S. at 4, the prosecution failed to disclose that one of its key witnesses, the defendant's brother, had tested deceptive to polygraph questions about whether he had assisted his brother in the robbery/murder and whether he had been present at the murder scene with his brother. Because the polygraph evidence was inadmissible in the state of Washington, *even for impeachment purposes*, *id.* at 6, its disclosure never could have led to admissible evidence which would have resulted in a different outcome at trial. *Id.* at 8. Thus, the Court held that the government did not violate its disclosure obligations under *Brady*. *Wood*, 516 U.S. at 8. *See also Goins v. Angelone*, 226 F.3d 312, 325-26 (4th Cir.) (same ruling in Virginia death penalty case), *cert. denied*, 531 U.S. 1046 (2000). Even a *per se* rule excluding all polygraph evidence does not offend the Constitution. *Scheffer*, 523 U.S. at 312. *See also United States v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir.) (reaffirming Fourth Circuit's *per se* rule of exclusion of evidence of polygraph testing in federal cases), *cert. denied*, 540 U.S. 1090 (2003).[8]

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[8] In a footnote, Elliott claims that the Fourth Circuit has acknowledged that "Circuits that have not yet permitted

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Elliott argues that he was entitled to show the jury that Gragg came forward with more information about Elliott after the police told her she had lied to them. The trial court's ruling clearly permitted Elliott to accomplish his goal by thorough cross-examination about the fact that the police accused Gragg of lying and, more importantly, about the timing of the accusation as prompting her later disclosures. As noted above, Elliott thoroughly accomplished his goal

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evidence of polygraph results for any purpose are now the decided minority," citing *A & S Council Oil*. (Pet. 28 n.15). Elliott then lists a series of cases cited by *A & S Council Oil* but without including the Fourth Circuit's parenthetical descriptions which make it clear that the "purposes" vary widely: *e.g.*, by stipulation of the parties, as part of the disclosure of the terms of plea agreement with a testifying witness, to rebut a claim of coercion, and where the trial court found that the probative value outweighed the unfair prejudice, pursuant to FRE 403. 947 F.2d at 1134 n.4. Indeed, all the cited cases, and *A & S Council Oil*, deal only with federal rules of evidence, not with any constitutional limits on the rules of evidence adopted by the States. Moreover, Elliott's assertion that *A & S Council Oil* allowed admission of the test results is misleading. The case explicitly rejected the claim that the Confrontation Clause requires admission of the results to impeach the testimony of the government's key witness. 947 F.2d at 1133-34. It ruled only that they were admissible pursuant to FRE 705, in cross-examination of the government's psychiatric expert witness. The expert testified to the government witness's ability "to distinguish reality from imagination," and the polygraph results were part of the "underlying facts or data" relied on by the expert in his examination of the witness. 947 F.2d at 1134. The Fourth Circuit specifically held that FRE 705 "permits the cross-examiner to require the expert to reveal **otherwise-inadmissible** underlying information to the jury." *Id.* (emphasis supplied).

because Gragg fully admitted on cross-examination that the police told her they knew she was a liar – and even that they threatened to charge her as an accomplice – *before* she decided to provide them with the damaging evidence about Elliott's January 2 phone call. (JA 1626, 1637, 1641-57, 1663). The district court correctly denied a COA on this non-debatable issue.

IV. No verdict form claim was preserved for review, and the related ineffective assistance of counsel claim presents no issue worthy of certiorari review.

Elliott argues an "error" with respect to the sentencing verdict form; however, his claim below was that his trial counsel failed to object to the form. It thus was governed in state court by *Strickland v. Washington*, 466 U.S. 668 (1984), and in federal court by § 2254(d). The state habeas court found that trial counsel's failure to object to the verdict form was neither deficient nor prejudicial because the form was a correct statement of law. *Elliott*, 652 S.E.2d at 485-86. The district court's agreement with that finding unquestionably was correct under § 2254(e)(1), and it was not debatable under § 2253(b)(2).

Elliott's claim of ineffective assistance of counsel requires federal courts to be "doubly deferential" in their review: both to the reasonableness of the state court's findings and to the reasonableness of trial counsel's decisions. *See Knowles v. Mirzayance*, 129

S.Ct. 1411, 1420 (2009) (applying "the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard") *citing Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). Such deference was particularly appropriate in this case: Elliott's ineffectiveness claim challenged the state habeas court's finding construing state law. Elliott alleged in state court that counsel should have objected because one of the verdict forms required the jury to find unanimously that none of the aggravating factors had been proven beyond a reasonable doubt before sentencing Elliott to life imprisonment. Elliott argues that a State may not require unanimity on aggravating factors. He cites no authority for his novel theory.

In Virginia criminal cases, juries always have decided by unanimous verdicts. Rule 3A:17(a), *Rules of the Supreme Court of Virginia* (Resp. App. 1). Juries must decide the aggravating factors and the ultimate sentence by unanimous verdict. *See Evans v. Commonwealth*, 323 S.E.2d 114, 121 (Va. 1984), *cert. denied*, 471 U.S. 1025 (1985). The Supreme Court of Virginia thus reasonably found that Elliott's claim satisfied neither prong of the *Strickland* test. *Elliott*, 652 S.E.2d at 485-86.

The district court found that "the verdict form conformed to Virginia law," citing *Evans*. (Pet. App. A-48). The district court also found that Elliott "misreads" the verdict form. (*Id.*). The district court had no option but to find that the state court decision was reasonable. Elliott cited no precedent to the contrary

in either his habeas petition, his motion for rehearing, or his application for a COA.[9]

Elliott observes that Virginia law requires that a capital defendant must be sentenced to life if "even a single juror" would vote for life. (Pet. 29). His point is irrelevant to the issue of unanimity; rather, it describes jury nullification. He now relies on Virginia Code § 19.2-264.4(E) (Pet. App. B-12), but he failed to cite that section to the Fourth Circuit, and it does not address unanimity but instead imposes a result when a jury *fails to reach a unanimous verdict*. No rule of law entitles a defendant to a verdict form or instruction inviting a juror to disregard his oath and deliberately fail to reach a verdict. *See Jones v. United States*, 527 U.S. 373, 381 (1999) ("the Eighth Amendment does not require that the jury be instructed as

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[9] Elliott's certiorari petition cites *Tuilaepa v. California*, 512 U.S. 967, 971 (1994), and *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). (Pet. 32) Elliott did not cite either case in his initial motion to the Fourth Circuit, and neither supports his assertion that the district court "erroneously transferred and inverted the unanimity requirement from the jurors' *selection* phase decision to its *eligibility* phase decision." (*Id.*) (emphasis original). *Tuilaepa* simply discusses the matters appropriate to be considered by the jury with respect to each question; it does not discuss, much less establish, any constitutional requirement for a different verdict standard with respect to each. The cited portion of *Buchanan* in fact stresses the *greater* need for uniformity in determining eligibility: "It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion." *Buchanan*, 522 U.S. at 275. Moreover, *Buchanan* did not address Virginia's, or any other State's, requirement of unanimity on aggravating factors.

to the consequences of their failure to agree."). Indeed, this Court has observed that "the very object of the jury system is to secure *unanimity* by a comparison of views." *Id.* at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)) (emphasis added).

Elliott argues that requiring a unanimous verdict on the absence of aggravating factors somehow eliminates the requirement for a unanimous finding in order for the defendant to be eligible for the death sentence. (Pet. 32) He does not explain this *non sequitur*. Unanimity on aggravating factors, for or against, does not compel the jury to find aggravators, much less a death sentence. Elliott's jury received three verdict forms (JA 1962-63, 2061), one for death and two for life, but Elliott focuses only on the third form, requiring a life sentence if no aggravating factors were found. (Pet. App. C-1). The second form provided for a life sentence even if the jury found an aggravating factor beyond a reasonable doubt.[10]

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[10] The body of the second form read in its entirety as follows:

> We, the jury, on the issue joined, having found the defendant, LARRY BILL ELLIOTT, guilty of Capital Murder in that he did willfully, deliberately and premeditatedly kill more than one person as part of the same act or transaction, and, having found unanimously and beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture; and/or depravity of mind; and/or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered

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Nothing in the forms limited the jury's ultimate decision whether or not to impose a death sentence, except for the third form which limited the sentence to life. *See Weeks v. Angelone*, 528 U.S. 225, 235 n.4 (2000) (noting that Virginia's verdict form did not curtail the jury's ability to sentence to life.)

The balance of the cases cited by Elliott are inapposite. Each deals with improper limits on a jury's consideration of *mitigating* evidence, not on the standard by which it finds *aggravating* factors.[11]

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all the evidence in aggravation and mitigation of the offense, fix his punishment at:

O Imprisonment for life, OR

[Check one]

O Imprisonment for life, and a fine of $ _____

Elliott v. Warden, Record No. 050573, Petitioner's State Habeas Appendix at 5625.

[11] *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (may not impose sentences based on a provision of state law held unconstitutional); *Murtishaw v. Woodford*, 255 F.3d 926, 969-70 (9th Cir. 2001) (error where instruction said "shall impose" death if aggravating outweighs mitigating based on state not in effect at the time of the murder); *Rojem v. Gibson*, 245 F.3d 1130, 1136-38 (10th Cir. 2001) (omission of the uniform weighing instruction created the possibility that the jury may have been prevented from considering mitigating evidence, but approving the omitted instruction which requires unanimous findings); *Carter v. Bowersox*, 265 F.3d 705, 715-16 (8th Cir. 2001) (error to omit state-approved instruction that a life sentence is required if, after first unanimously finding the existence of an aggravating factor, the jury then "failed to make a unanimous finding that the death penalty was warranted" before weighing the evidence in mitigation); *Mills v. Maryland*, 486 U.S. 367 (1998) (error to require unanimous finding as to particular mitigating

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Nothing in the forms provided to Elliott's jury prevented their giving full consideration and effect to any mitigating evidence they found, and Elliott does not argue that the jury was so prevented.

Finally, Elliott speculates that the jury wanted to sentence him to life because it asked about imposition of a fine. But the jury sentenced Elliott for the capital murder and the first-degree murder at the same time (JA 2094-95) and had the option to impose a fine for the first-degree murder conviction as well. (JA 321, 2063). Elliott's weak speculation hardly demonstrates that the state court unreasonably found the verdict form correct and counsel not to have been ineffective, or that the federal district court's decision in the case was debatable, and the Fourth Circuit's denial of a COA is worthy of certiorari review.

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circumstances); *Smith v. Spisak*, 129 S.Ct. 1319, *cert. granted*, (Feb. 23, 2009) (whether *Mills* requires that the jury be explicitly instructed that they need not be unanimous as to mitigating factors to impose a life sentence).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LORETTA K. KELLY, WARDEN,
Sussex I State Prison

WILLIAM C. MIMS
Attorney General of Virginia

JERRY P. SLONAKER
Senior Assistant Attorney General

MATTHEW P. DULLAGHAN
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-4073
(804) 786-0142 (fax)

RULES OF THE SUPREME COURT OF VIRGINIA

Part 3A Criminal Practice and Procedure

RULE 3A:17. Jury Verdicts. –

(a) Return. – In all criminal prosecutions, the verdict shall be unanimous, in writing and signed by the foreman, and returned by the jury in open court.

(b) Several Accused. – If there are two or more accused, the jury may return a verdict as to any of them as to whom it can agree.

(c) Conviction of Lesser Offense. – The accused may be found not guilty of an offense charged but guilty of any offense, or of an attempt to commit any offense, that is substantially charged or necessarily included in the charge against the accused. When the offense charged is a felony, the accused may be found not guilty thereof, but guilty of being an accessory after the fact to that felony.

(d) Poll of Jury. – When a verdict is returned, the jury shall be polled individually at the request of any party or upon the court's own motion. If upon the poll, all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged.

STATE OF FLORIDA)
) ss.
CITY OF PENSACOLA)

AFFIDAVIT OF WILLIAM JOSEPH THRALL

I, WILLIAM JOSEPH THRALL, do depose and state as follows:

* * *

11. I have not spoken directly to Dana's children (my grandchildren), as they were whisked off to California right after the murders. However, I ~~have~~ heard that [redacted name of minor child] said he saw either a black man or a man wearing black running from the rear of the townhouse. Although the police talked to the boy, to my knowledge, the police never pursued this lead because ~~they~~ the rest of my family wanted to protect the boys.

* * *

STATE OF VIRGINIA)
) ss
CITY OF WOODBRIDGE)

AFFIDAVIT OF ROBERT CONWAY LESSEMUN

I, ROBERT CONWAY LESSEMUN, do depose and state as follows:

* * *

4.2. Officer Robert Zinn (retired). I met with Robert Zinn on February 11, 2005 at 9:00 a.m., at Aunt Sarah's Family Restaurant, Jefferson Highway, Fredricksburg [*sic*], Virginia. Ex. Sergant [*sic*] Zinn was the crime scene supervisor for the Prince William County Police department until his recent retirement. . . .

* * *

4.2.20. He was asked about the collection of the blood from the back gate. He said he was not initially aware of that but became aware of a problem and they went back within not more than 2 days or maybe the next day to collect the blood from the back gate. The blood was not collected on the day of the examination of the scene.

* * *

4.3. Robert Kovach. I interviewed Robert Kovach by telephone on February 11, 2005 at 6:00 p.m. This officer has moved to Lake Worth, Florida since the murders. I asked him if he had spoken with the Thrall children ([redacted

name of minor child] and [redacted name of minor child]) the day of the murders. Mr. Kovach said he was one of the first officers on the scene and was responsible for the welfare of the Thrall children. He used the word "we" when admitting that he and another officer was with the Thrall children for some time after the shootings. He told me the children did speak to him and did tell him things, but he was not prepared to discuss those conversations without the consent of the Commonwealth Attorney's Office or Sargent Hoffman.

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4.9. Cameron Thrall. I met with Cameron Thrall on February 24, 2005, at 3pm, in Pensacola, Florida. Cameron Thrall is the brother of Dana Thrall, and is in the process of adopting her two sons, [redacted name of minor child] and [redacted name of minor child]. Based on my interview with Robert Kovach, I knew the police had spoken with [redacted name of minor child] and [redacted name of minor child]. Cameron confirmed that [redacted name of minor child] referred to a black man running out of the of the [sic] town home right after the murders. Cameron said he did not mind telling me this because this was not new information. The boys were counseled after the murder by Prince William County counselor.

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COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF PRINCE WILLIAM)

AFFIDAVIT OF TINA MILLER

I, TINA MILLER, depose and state as follows:

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11. Later in the day, a detective came to my house and interviewed the boys. They were interviewed in my family room and I was in another room, so I do not know what the boys said.

The crimes were so long ago and since that time I have been diagnosed with w/ [sic] MS. I do not recall everything nor the sequence of events.

* * *

AFFIDAVIT

DAVID WATSON, first being duly sworn, states as follows:

* * *

2. I was present at the crime scene on the morning of the murders. I noticed what looked like a blood stain on the inside of the gate in the backyard of the townhouse, I pointed it out to Police Officer Leo, the crime scene analyst who was collecting evidence, and suggested he collect the stain as evidence. At the end of the day as we were outside and preparing to leave the scene, I asked Officer Leo if he had remembered to collect the stain from the gate. He went back into the house and when he returned a few minutes later he verified that he had collected that evidence. It was some months later, however, before photographs of the gate were taken.

3. Police Officer Zinn was present at the crime scene for a short period of time on January 2, 2001, but he did not supervise Officer Leo's collection of the stain from the gate.

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